LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JUL 13 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-116

RALPH D. ROCKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ARNOLD M. WEINER,
Ten Light Street,
Baltimore, Maryland 21202,

A. KENNETH PYE,
2802 Chelsea Circle,
Durham, North Carolina.

The Daily Record Co., Baltimore, Md. 21203

Table of Contents

	PAGE
Opinions	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting Writ	12
Conclusion	28
Appendices:	
Appendix A:	
United States of America v. Ralph D. Rocks, United States Court of Appeals for the Fourth Circuit, No. 72-1862, decided June 14, 1973	1a
Appendix B:	
United States of America v. Ralph D. Rocks, United States District Court, E.D. Virginia, Crim. No. 230-71-N, decided March 9, 1972	3a
Appendix C:	
18 U.S.C. §1952	18a
Article 27, Section 23, of the Annotated Code of Maryland	18a
Amendment 5, Constitution of the United States	20a
Amendment 6, Constitution of the United States	20a
Chapter 427 of the Laws of Maryland of 1972	20a

Table of Authorities

Cases

Azrak v. State, 183 So. 2d 712 (Fla. App., 1966)	25
Barefield v. State, 14 Ala. 603 (1848)	25
Bosco v. State, 157 Md. 407, 146 A. 238 (1929)	24
Clay v. Sun Insurance Office, Ltd., 363 U.S. 207	27

PAGE

Clews v. People, 377 P.2d 125 (1962) 24
Coleman v. Ginsberg, 428 F.2d 767 (2d Cir., 1970) 27
Commonwealth v. Donovan, 49 N.E. 104 (Mass., 1898) 24
Cunningham v. State, 190 Md. 578, 59 A.2d 337 (1948) 24
Dillon v. United States, 391 F.2d 433 (10th Cir., 1968) 26
Downey v. Peyton, 451 F.2d 237 (4th Cir., 1971) 16
Dresner v. City of Tallahassee, 375 U.S. 136 27
Dukehart-Hughes Tractor & Equipment Co. v. United States, 341 F.2d 613 (Ct. of Claims, 1965) 25
Glickfield v. State, 203 Md. 400, 101 A.2d 229 (1953) 24, 25
Guthrie v. United States, 387 F.2d 569 (4th Cir., 1967) 14
In re Elliott, 446 P.2d 347 (Wash., 1968) 27
In re Yee Gee, 83 F. 145 (D. Wash., 1897) 25
Mattox v. United States, 146 U.S. 140 15
McLemore v. State, 125 So. 2d 86 (Miss., 1961) 24
Miller v. United States, 403 F.2d 77 (2d Cir., 1968) 16
Newman v. State, 23 S.E. 831 (Ga., 1895) 25
Norton v. Benjamin, 220 A.2d 248 (Maine, 1966) 27
People v. Lyons, 122 N.E.2d 809 (Ill., 1954) 24
People v. Schneider, 14 N.W.2d 819 (Mich., 1944) 24
Pierce v. HEW, 254 A.2d 46 (Maine, 1969) 27
Rakes v. United States, 169 F.2d 739 (4th Cir., 1948) 14
Remmer v. United States, 347 U.S. 227 ..... 14, 16
Rewis v. United States, 401 U.S. 808 ..... 2, 17, 18, 19, 21
Ryan v. United States, 191 F.2d 779 (U.S. App., D.C., 1951) 14
Selvidge v. State, 72 S.W.2d 1079 (Texas, 1934) 24
State v. Good, 156 S.E.2d 8 (W. Va., 1967) 25
State v. Harrah, 132 S.E. 654 (W. Va., 1926) 24
State v. Hazellief, 148 So. 2d 28 (Fla. App., 1962) 25
State v. Hibicke, 56 N.W.2d 818 (Wis., 1953) 25
Streeter v. State, 104 So. 858 (Fla., 1925) 25
Sugarman v. State, 173 Md. 52, 195 A. 324 (1937) 24, 25
United States v. Altobella, 442 F.2d 310 (7th Cir., 1971) 2, 17, 18, 20, 21

PAGE

United States v. Baggett, No. 72-1548, decided June 19, 1973, not yet reported 25
United States v. Corallo, 413 F.2d 1306 (2d Cir., 1969) 24
United States v. D'Amato, 436 F.2d 52 (3d Cir., 1970) 26
United States v. Kubacki, 237 F. Supp. 638 (E.D., Pa., 1965) 24
United States v. McCormick, 442 F.2d 316 (7th Cir., 1971) 21
United States v. McKinney, 429 F.2d 1019 (5th Cir., 1970) 16
United States v. McMann, 435 F.2d 813 (2d Cir., 1970) 16
United States v. Nardello, 393 U.S. 286 26
United States v. Palermo, 410 F.2d 468 (7th Cir., 1969) 15
United States v. Parzow, 391 F.2d 240 (4th Cir., 1968) 24
United States v. Raff, 161 F. Supp. 276 (M.D. Pa., 1958) 25
United States v. Stagman, 446 F.2d 489 (6th Cir., 1971) 21, 26
United States v. Wechsler, 392 F.2d 344 (4th Cir., 1968) 24
United States v. Zirpolo, 288 F. Supp. 993 (D. N.J., 1968) 24
White v. State, 245 S.W.2d 704 (Tex., 1952) 24

Others

American Bar Association, Ethics Op. 319 (1968) 13
American Bar Association, Code of Professional Responsibility, EC 7-29 (1969) 13
Moore, Federal Practice, Vol. 6A, Section 59.08(4), p. 3814 ..... 13, 14
Virginia Code of Professional Responsibility, EC 7-29, p. 50 (1971) 13
Wright, Federal Practice and Procedure, Vol. 2, Sections 381, 554 (1969) 14, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. ------

RALPH D. ROCKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Ralph D. Rocks, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on June 14, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears as Appendix A hereto. The opinion of the District Court, which was adopted by the Court of Appeals, was reported as *United States v. Ralph D. Rocks*, 339 F. Supp. 249 (E.D.Va., 1972), and it appears as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on June 14, 1973. This petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Should this Court, in the exercise of its supervisory role over the administration of justice in the Federal courts, and in the light of recent amendments to the code of professional ethics, require that defense counsel be afforded the right of cross-examination in post-trial hearings involving juror misconduct.

2. Was Petitioner denied due process of law and effective assistance of counsel when, in a post-trial hearing involving juror misconduct, after it appeared that one or more jurors may have read a prejudicial article in the course of their deliberations, defense counsel was denied the right of cross-examination, the trial judge refused to ask relevant non-cumulative questions, and, on the basis of the fragmentary record, it was held that Petitioner had not sustained his burden of proving that juror misconduct had in fact occurred.

3. Does the decision in the present case, in upholding a conviction under 18 U.S.C. §1952 where the single use of an interstate facility was a mere happenstance and incidental to a course of activity which was essentially local, conflict with the decisions of this Court and of the Seventh Circuit in *Rewis v. United States*, 401 U.S. 808, and *United States v. Altobella*, 442 F.2d 310 (7th Cir., 1971).

4. Is it appropriate, in a Federal criminal prosecution, in which violation of State law is an element of the federal crime, to certify unresolved issues of State law, which may be dispositive of the case, to the highest Court of the State

pursuant to the Uniform Certification of Questions of Law Act.

5. Should the court below have certified unresolved questions of Maryland bribery law, which might have been dispositive of this federal criminal case, and on which authorities from other jurisdictions were in conflict, to the Court of Appeals of Maryland pursuant to the Uniform Certification of Questions of Law Act.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutes and constitutional provisions involved in this petition are:

(A) The Federal Anti-Racketeering Act, 18 U.S.C. §1952, which forbids the use of an interstate facility to further "bribery . . . in violation of the laws of the State in which committed . . ."

(B) Article 27, Section 23, of the Annotated Code of Maryland, which forbids bribery of ". . . any officer or any employee . . . of any county . . . for the purpose of influencing him in the performance of his official duties . . ."

(C) The due process clause of the Fifth Amendment to the Constitution of the United States.

(D) The impartial jury and assistance of counsel clauses of the Sixth Amendment to the Constitution of the United States.

(E) Chapter 427 of the Laws of Maryland of 1972, which provides that the Maryland Court of Appeals "may answer questions of law certified to it by . . . a Court of Appeals of the United States . . . when requested by the certifying court if there is involved . . . a question of law of this State which may be determina-

tive of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Court of Appeals of this State".

These statutes and constitutional provisions are set forth as Appendix C hereto.

STATEMENT OF THE CASE

Petitioner, Ralph D. Rocks, was convicted, after a jury trial, on a single count indictment which charged a violation of the Federal Anti-Racketeering Act, 18 U.S.C. §1952, and, by incorporation, the Maryland bribery statute, Art. 27, §23 of the Annotated Code of Maryland. The indictment alleged that Rocks, a Maryland resident and real estate developer, together with Jesse S. Baggett, a member of the Board of County Commissioners of Prince George's County, Maryland, used an interstate facility to promote the bribery of Baggett.

Rocks and Baggett were tried separately at the Government's election. The Rocks case was transferred to Norfolk, in the Eastern District of Virginia, after the Baggett trial, which took place first in Baltimore, resulted in extensive publicity.

The essence of the alleged offense was that Rocks signed a $3,500 check in Washington, D. C., in December, 1964, made payable to a Maryland tractor firm; that Baggett, three days later, purchased a tractor with the check; that the tractor, although purchased by the Rocks firm and depreciated on its books, was used by Baggett, from time to time, on his farm in Calvert County, Maryland; and that Rocks, by purchasing the tractor and permitting Baggett to use it, sought to influence Baggett's actions on various but unidentified rezoning applications which Rocks had filed in

Prince George's County, Maryland. The alleged violation of 18 U.S.C. §1952 was the movement of the $3,500 check from the District of Columbia to Maryland. The Government did not allege, and there was no evidence tending to show, where, how, by whom or under what circumstances the check was delivered to Baggett.

Rocks was a resident of Montgomery County, Maryland, but his business office was located in the District of Columbia. Although he purchased and developed land in various area of Maryland and Virginia, his principal development activities were in Prince George's County, Maryland, immediately adjacent to the District of Columbia. Baggett was a County Commissioner from 1964 to 1970, and, from December, 1964, to December, 1966, he was Chairman of the Board (Tr. 2038). Rocks and Baggett were shown to have been close personal friends for many years preceding the alleged offense (Tr. 676-83, 1885). They were business associates, with others, in a federal savings and loan association formed in 1962 (Tr. 476-94, 745-51).

The Government contended, and the evidence showed, that the decade of the 1960's was one of great growth in Prince George's County. The Board of County Commissioners, who had final authority in all zoning matters, favored expansion and, in general, they favored rezoning so as to permit development (Tr. 723-29). It was uncontradicted that no one County Commissioner exercised influence over others; that the Chairman of the Board did not vote on rezoning applications except to break a tie; that Baggett did not urge other Commissioners with respect to individual applications; and that the Commissioners did not disqualify themselves from participating in cases involving applications filed by friends (Tr. 942-44, 997, 1054, 1080-81, 1953-55, 1979-84, 2011, 2038-39, 2043, 2204).

On December 23, 1964, when the check for the tractor was issued, Rocks had no zoning applications pending before the County Commissioners. Applications were filed and determined at various times prior and subsequent to that date. The evidence as to them, however, showed that Rocks was not always successful, and that, in fact, a significant percentage of his applications were denied (Tr. 530, 532-36, 2267-68). A zoning expert testified that all of the Rocks matters were decided by the County Commissioners in accordance with generally accepted zoning principles (Tr. 2267), and this testimony was not contradicted.

It was neither charged nor proven: that the alleged bribe was given to influence Baggett in the performance of any specific act in any specific matter; that there was ever any discussion or agreement between Rocks and Baggett that the purpose of the alleged bribe was to influence Baggett; that Rocks intended that Baggett perform any improper act on his behalf; or that any improper act was ever performed by Baggett on behalf of Rocks. In this respect, as the Government counsel acknowledged from the outset, the case proceeded upon a theory unlike "most, indeed, perhaps all, of the cases, the bribery cases, under 1952, that have arisen thus far, in the past . . ." (Hrg. 5/7/70, Tr. 82).

In seeking acquittal, at trial, Petitioner contended that the case involved activity which was essentially local. The use of an interstate facility, he urged, was only a matter of happenstance and so minimal and incidental to the general course of conduct that the case was not within the reach of 18 U.S.C. §1952. It was also contended, in pretrial motions for dismissal and in the motions for acquittal, that the conduct of the Petitioner did not amount to bribery in violation of the Maryland law and that, as a consequence, the "unlawful activity" element of the Federal statute was not established. Although there were virtually no cases constru-

ing the Maryland bribery statute, the authorities from other jurisdictions, it was noted, were in conflict, a substantial number of them holding that conduct such as that of Rocks here was not bribery. The District Judge declined to enter a judgment of acquittal and submitted the case to the jury.

After the jurors had deliberated an entire day without reaching a verdict, they asked permission to recess (Tr. 3434, 3453). That evening, during recess, an article was published on the front page of the local section of the Norfolk evening newspaper, stating, *inter alia*, that:

1. Baggett, charged in a similar indictment, had been convicted in Maryland of accepting a bribe;
2. Sentencing of Baggett which could involve up to five years in prison and a $10,000 fine had been delayed pending the outcome of the Rocks case;
3. Rocks' trial had been transferred to Norfolk because of a flood of publicity growing out of the Baggett trial;
4. Rocks had been acquitted last year along with another man for federal fraud and conspiracy involving $2.6 million in construction loan funds.

When the jurors assembled the next morning, they returned their verdict within minutes.

On the basis of certain information which came to the attention of defense counsel and which indicated that one or more of the jurors had read the prejudicial article during deliberations, a motion was made for the Court to assume jurisdiction over further examination of the jurors on that issue and for the granting of a new trial. The District Judge held a hearing on February 23, 1972, himself questioning the jurors, but denying defense counsel the right to cross examine and declining to pose a number of inquiries which were requested of him.

In spite of the severe limitations imposed by the District Judge, six of the jurors gave testimony about the article, three of them relating conversations among jurors during the brief deliberations on the second day. Juror Bowers testified that he had seen the headlines but had not read the article (Hrg., Tr. 20). When asked whether he heard anyone discuss the article itself during deliberations, he stated that he could not remember (Hrg., Tr. 22-25). Counsel requested permission to cross examine Juror Bowers on the limited issue of his alleged failure of recollection, but the District Judge refused (Hrg., Tr. 25-26). Juror Early said that he heard a juror ask if anyone had seen anything in the newspaper but, he added, he could not recall either the identity of the juror who had made this inquiry or that of the juror who had answered (Hrg., Tr. 38-39). The District Judge again denied counsel the right to cross examine (Hrg., Tr. 40).

Juror Neese testified specifically that there was discussion of the article during deliberations; that some of the jurors said they had read it; and that this conversation, to the best of her recollection, had taken place among three jurors who, at the close of the first day's proceedings, had voted for acquittal. The testimony of Juror Neese was that:

> "Q. You heard talk among jurors that an article had appeared in the paper? A. Yes, sir.
>
> "Q. Can you remember anything else about what was said or who might have said that, or a response by any juror? A. No, I don't know specifically who said what. It was just vague discussions regarding the fact that an article had appeared in the paper and *I do know that some of the jurors had read it* but who, and what they read, I can't say for sure."
>
> * * * * * *
>
> "Q. Now, was this more than one juror that you heard discussing the fact that he or she had read it? A. I think it was two.

"Q. You can't recall at this time who they were? A. No, sir.

"Q. And can you recall, other than what you have told us, anything else about this, as to what the discussion might have been?

"*I think what you said is that the discussion was that an article had appeared in the paper and the discussion indicated that some of the jurors had read it. Is that correct? A. Yes, sir.*

* * * * * *

"Q. And you don't remember whether it was a man and a woman discussing it or two women or two men? A. Well, there were three jurors, of course, as you know, when the verdict was given, who were — who voted 'not guilty' and of course when we went in there the next morning, I would suppose — or I think that it was those three who were discussing the article." (Hrg., Tr. 40-57) (Emphasis Supplied.)

Counsel's request to develop the testimony of Juror Neese was denied (Hrg., Tr. 58). Similarly, the District Judge refused to question Juror Neese himself as to the location of the various jurors at the time of the discussion and whether the persons overheard discussing the article were men or women or older or younger jurors (Hrg., Tr. 59).

Seven of the jurors had gone to a restaurant across the street from the court house immediately after the verdict was returned. The article was discussed by them as they entered the restaurant, while they sat there and as they dispersed. Juror Bowers recalled that, either just before or just after the group left the restaurant, someone commented to him, "We made the paper" (Hrg., Tr. 97, 101-2). Juror Miller recalled that, while they were drinking coffee, one of the jurors, the identity of whom he did not recall, commented that, "They must have read the article" and later, while walking toward his car, he asked, "What article?" and

received the reply, "You read the article when you get home and you'll find out" (Hrg., Tr. 90-95). Juror Levine testified that, while sitting at the table in the restaurant, she heard one of the jurors say, "[T]hat it was the newspaper article which had convinced them. Now, that is what I heard about the newspaper" (Hrg., Tr. 76-77). Juror Stearns testified that, after she left the restaurant with Juror Seiler and started home, she heard somebody say, "Well, I wonder if they read it" (Hrg., Tr. 110-11).

Counsel requested the District Judge, in light of the testimony of Juror Neese, to inquire of the three jurors who had originally voted for acquittal and to ask them, specifically, whether they had engaged in the discussion which Juror Neese had overheard (Hrg., Tr. 116-17). The District Judge denied the request (Hrg., Tr. 120). Similarly denied were requests to examine more fully Jurors Bowers, Miller and Levine as to the incidents which they had related. A number of other suggested questions, all of them going to the essential issue, were also refused (Hrg., Tr. 14, 16, 25, 26, 41-42, 50-54, 59, 64, 77-79).

The District Judge found that none of the jurors had read the article before the verdict was rendered. The fragmentary record which resulted from the denial of cross examination and the refusal to develop lines of inquiry was used as the basis for disregarding or disbelieving the testimony of half the jurors. The testimony of Juror Neese was dismissed altogether (Opinion, App. B, pp. 15a-16a). The Court apparently chose to disbelieve the testimony of Jurors Miller, Bowers, and Levine concerning mention of the article after verdict. The testimony of Juror Stearns, which related to a different conversation, was accepted as a substitute for the incidents related by the other three (Opinion, App. B, pp. 16a-17a). A new trial was denied.

Judgment of conviction and sentence, imposing upon Petitioner a 15 month term of imprisonment, was entered on June 16, 1972. Notice of appeal was entered immediately. On July 1, 1972, while the appeal was pending, there went into effect in Maryland a uniform statute which conferred upon its highest court, the Court of Appeals, jurisdiction to answer questions of law certified to it by Courts of Appeals of the United States. The Petitioner filed a motion for certification with the Fourth Circuit, suggesting that the case raised a number of issues relating to the Maryland crime of bribery, none of which had previously been decided by the highest court of that State, and that the authorities from other States, on the same issues, were in conflict. Certification was suggested as the vehicle for permitting the Fourth Circuit to avoid the necessity of making determinations of Maryland law without any clear direction from the Maryland courts.

The Court of Appeals entered an order denying the motion for certification. In its opinion and judgment, filed on June 14, 1973, the Court of Appeals adopted, as its own, the opinion of the District Judge with respect to the post-trial hearing. The Court of Appeals, further, rejected summarily the arguments that the use of interstate facilities was insufficient to amount to a violation of 18 U.S.C. §1952 and that the Government had not made out a case of bribery under Maryland law.

REASONS FOR GRANTING THE WRIT

I. THIS COURT, IN THE EXERCISE OF ITS SUPERVISORY ROLE OVER THE ADMINISTRATION OF JUSTICE IN THE FEDERAL COURTS, AND IN THE LIGHT OF RECENT AMENDMENTS TO THE CODE OF PROFESSIONAL ETHICS, SHOULD REQUIRE THAT DEFENSE COUNSEL BE AFFORDED THE RIGHT OF CROSS-EXAMINATION IN POST-TRIAL HEARINGS INVOLVING JUROR MISCONDUCT.

II. PETITIONER WAS DENIED DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF COUNSEL WHEN, IN A POST-TRIAL HEARING INVOLVING JUROR MISCONDUCT, AFTER IT APPEARED THAT ONE OR MORE JURORS MAY HAVE READ A PREJUDICIAL ARTICLE IN THE COURSE OF THEIR DELIBERATIONS, DEFENSE COUNSEL WAS DENIED THE RIGHT OF CROSS-EXAMINATION, THE TRIAL JUDGE REFUSED TO ASK RELEVANT NON-CUMULATIVE QUESTIONS, AND, ON THE BASIS OF THE FRAGMENTARY RECORD, IT WAS HELD THAT PETITIONER HAD NOT SUSTAINED HIS BURDEN OF PROVING THAT JUROR MISCONDUCT HAD IN FACT OCCURRED.

The testimony of Jurors Miller, Neese, Levine, Bowers and Stearns, all of whom recalled some reference to the prejudicial newspaper article, when compared with the testimony of each juror that he or she had not personally read the article, highlights the fundamental error of the trial court in denying the right of cross-examination. In short, the effect of the decision below is that when a substantiated allegation of jury misconduct is made, a court may deny counsel the right to examine the jurors personally, ask only such questions as it desires, and then find that the evidence does not sustain the allegation on the basis of the fragmentary record adduced from its limited questioning. Approval of this contention would constitute the death knell of the highly desirable conduct exemplified by Petitioner's defense counsel in reporting possible juror misconduct to the Court promptly after its discovery.

In 44 states (including Virginia) and the District of Columbia, counsel may by law interrogate jurors *ex parte*

and report the matter to the court only upon the conclusion of the inquiries. Cf. ABA Ethics Op. 319 (1968); ABA Code of Professional Responsibility, EC7-29 (1969). The Virginia Code of Professional Responsibility, promulgated in 1971, pursuant to the revised ABA canons, was in effect in the Eastern District of Virginia where the trial in this case had been held and where the jurors were located. It provides that:

> "After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. *Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected.*" EC 7-29, p. 50 (Emphasis supplied).

Notwithstanding this explicit authority for full *ex parte* inquiry by defense counsel, the questioning in the present case had been suspended voluntarily, and counsel had invited Court supervision, as soon as it became apparent that the verdict might be subject to challenge. The Court, upon acceptance of the invitation, then precluded defense counsel from any further meaningful participation. If the denial of cross-examination is to be sanctioned under these circumstances, its effect will not be to protect jurors, but, on the contrary, only to discourage lawyers in future cases from inviting Court supervision.

The courts below, in denying cross-examination, disregarded entirely the procedure suggested by Professor Moore:

> "Where a juror's testimony is competent to support or impeach the verdict it may be shown by affidavit; but where there is a sufficient showing to warrant a hearing it will often be advisable, when feasible, for the court to conduct a hearing *and take oral testimony that is sub-*

ject to cross-examination." 6A Moore, *Federal Practice*, Sec. 59.08(4), p. 3814 (Emphasis supplied).

Cf., also, *Remmer v. United States*, 347 U.S. 227, 229, 230; *Ryan v. United States*, 191 F.2d 779, 781 (U.S. App., D.C., 1951).

The Fourth Circuit itself, in *Guthrie v. United States*, 387 F.2d 569, 572 (1967), had earlier held that a post-trial inquiry into jury misconduct "without the safeguard of cross-examination" is "not an adequate method". In retreating from *Guthrie* in the present case, however, the courts below, citing *Rakes v. United States*, 169 F.2d 739 (4th Cir., 1948), equated all cross-examination with impermissible "harassment" and "searching hostile inquiry". *Rakes*, however, is patently inapposite. In that case, Judge Prettyman, in an era before the dramatic change in ethical canons, condemned only *ex parte* questioning of jurors, not examination under court supervision. Cross-examination need not be either harassing or hostile. Throughout the trial, counsel for each side sought advance rulings and had adhered to the Court's rulings (E.g., Tr. 18, 414). There was no reason to believe that counsel would have behaved differently in the post-trial setting. The record in the present case, particularly the examination of Juror Neese, provides classic examples of situations where cross-examination might have achieved an expansion, limitation or modification of testimony.

Cross-examination is vital if the truth is to be discovered about an issue such as the one involved in the post-trial hearing. To ask direct questions and accept the answers without additional inquiry is to transform a "full investigation" (Cf. 2 Wright, Federal Practice and Procedure, §554 (1969)) into a ritual where answers supporting the verdict are perfunctorily given and accepted and where it is impermissibly difficult for a defendant to sustain his burden of proving jury misconduct.

There is no reason for assuming that the usual technique for determining the truth, examination and cross-examination, is less likely to be effective after a verdict than before it. Petitioner is aware of no other context in an Anglo-Saxon criminal trial where examination by counsel has been replaced by examination by the Court except in *voir dire* examination of prospective jurors. The reasons supporting judicial discretion to conduct *voir dire* — saving of time; avoidance of conduct aimed at influencing jurors; concern that counsel-administered *voir dire* may be aimed at producing a partial rather than impartial jury (2 Wright, Federal Practice and Procedure, §381 (1969)) are obviously inapplicable where the issue occurs after verdict and involves a determination of whether a defendant has been deprived of a constitutional right.

This case, too, does not involve a juror who, in the course of trial, read a newspaper article, and where, prior to verdict, it was necessary to examine him to determine whether the trial should go forward. Present here is a situation involving (1) an article which was clearly prejudicial, (2) which was published at the crucial point of jury deliberations and (3) where evidence that jurors may have read the article was unknown to counsel until after verdict.[1] Counsel for Petitioner recognized that his inquiry would have been confined to whether the jurors had read the article or learned of its contents, and he sought no greater latitude.[2] He had no intent to explore the jurors' mental processes, for, as he set forth in his own motion, the issue of prejudice was for the Court to determine as a matter of law. See: *Mattox v. United States*,

[1] No issue of waiver is involved. The failure to demand sequestration cannot be deemed waiver. *United States v. Palermo*, 410 F.2d 468, 472 (7th Cir., 1969).

[2] Counsel made it clear that the object was solely to determine if the contents of the article in which the conviction was prominently mentioned had been discussed (Hrg., Tr. 3-4, 14-15).

146 U.S. 140, 148-150; *Remmer v. United States*, 347 U.S. 227, 229, 230; *Downey v. Peyton*, 451 F.2d 237, 239 (4th Cir., 1971); *United States v. McMann*, 435 F.2d 813, 819 (2d Cir., 1970); *United States v. McKinney*, 429 F.2d 1019, 1030 (5th Cir., 1970). There was, under these circumstances, no reason to anticipate the occurrence of any abuse in the course of the requested cross-examination.

The courts below relied on *Miller v. United States*, 403 F.2d 77, 82 (2d Cir., 1968), as authority for the proposition that "a convicted defendant does not have an unlimited right to cross examine jurors" (Opinion, App. B, p. 13a). Petitioner has never asserted an "unlimited right" to cross examine jurors (Hrg., Tr. 26). His counsel did not object to reviewing the subject matter of his questions with the District Judge in advance of asking the questions. Petitioner asserted only the simple right to ask relevant, non-cumulative, non-harassing questions designed to determine whether a juror read the article or learned of its contents. In substance, the courts below read *Miller* to say that this kind of examination can be denied.

Miller does not support such an interpretation. In *Miller*, one year after trial, defense counsel hired a lay investigator to interrogate jurors about matters, including questions relating to their mental processes during the jury deliberations, and the investigator had made announced visits to jurors homes and engaged in long and involved conversation with them. The subject matter of the investigation related to an issue raised and determined by the trial court before verdict and raised again in a motion for a new trial. The Court of Appeals declined to alter an injunction prohibiting further interrogations and in the process noted that "the judge may well find it better that he control any questioning, whether by having it done in open court, as the Supreme Court directed in *Remmer v. United States*, 347 U.S. 227, 74 S. Ct.

450, 98 L. Ed. 654 (1954) by allowing depositions where the prosecutor would have an opportunity to object to improper questions, or by passing in advance on the questions sought to be propounded." 403 F.2d 77, 82.

III. THE DECISION IN THE PRESENT CASE, IN UPHOLDING A CONVICTION UNDER 18 U.S.C. §1952 WHERE THE SINGLE USE OF AN INTERSTATE FACILITY WAS A MERE HAPPENSTANCE AND INCIDENTAL TO A COURSE OF ACTIVITY WHICH WAS ESSENTIALLY LOCAL, CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF THE SEVENTH CIRCUIT IN *REWIS v. UNITED STATES*, 401 U.S. 808, AND *UNITED STATES v. ALTOBELLA*, 442 F.2d 310 (7th Cir., 1971).

In its portion relevant here, the Federal Anti-Racketeering Act, 18 U.S.C. §1952, subjects to criminal penalty one who "travels in interstate . . . commerce or who uses any facility in interstate . . . commerce including the mail with intent . . . to promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on of . . . unlawful activity . . . and thereafter performs or attempts to perform any of the acts specified . . ." The term "unlawful activity" is defined to include "bribery in violation of the laws of the State in which committed" and such other locally prohibited activities as "extortion" and the operation of a "business enterprise involving gambling."

The present case represents a course of conduct which was essentially local and in which the single use of interstate commerce was incidental and insubstantial. It was precisely the type of activity which was held to be beyond the reach of §1952 by this Court in *Rewis v. United States*, 401 U.S. 808, and by the Seventh Circuit, applying the rules of *Rewis*, in *United States v. Altobella*, 442 F.2d 310 (7th Cir., 1971). The decision below, therefore, is in conflict with decisions rendered by this Court and by at least one other Federal Circuit.

The Government, in the court below, argued that *Altobella* "is inconsistent with the Fourth Circuit authorities", and it contended further that "nothing in *Rewis* . . . justifies the Seventh Circuit's decision in *Altobella*" (Gov't. Brief, pp. 27, 28). We submit, to the contrary, that *Altobella* was decided correctly and that the Fourth Circuit, and not the Seventh, fails to perceive the significance of *Rewis*.

For a period of almost nine years after the passage of the Federal Anti-Racketeering Act, the Government could point to various decisions by lower courts in which it had obtained an expansive reading of the statute. In *Rewis v. United States*, 401 U.S. 808, however, this Court held that the Act was not entitled to such lavish interpretation. Involved there were two Florida residents who ran a gambling operation, patronized by Georgia residents, in a Florida town a few miles south of Georgia, and who were alleged to have caused the interstate movement of their patrons. This Court reversed the convictions, holding that the operation of a gambling enterprise, frequented by out-of-state bettors, while literally within the language of §1952, did not constitute activity sufficient to violate the Act.

In the present case, in the courts below, the Government dismissed *Rewis* lightly, terming it a "tired nag"[3] and suggesting that its holding be restricted to the peculiar facts of that case. This Court, however, had obviously intended more, teaching, first, that the statute may not be employed mechanically, and second, that, operating as it does in the area of federal-state relations, the statute may not be deemed to have been transgressed unless there is present a substantial course of conduct attributable to each of its elements.

---

[3] See, Government's Response to the Defendant's Motion for a New Trial, filed 3/30/72, p. 12.

Section 1952 must be applied, the Court noted in *Rewis*, with recognition of the fact that it "was aimed primarily at organized crime and, more specifically, at persons who reside in one state while operating or managing illegal activities located in another" (401 U.S. 808, 811). There are overriding policy considerations which require that the lower federal courts exercise caution before finding that conduct, essentially local, amounts to the federal crime:

> *Given the ease with which citizens of our Nation are able to travel and the existence of many multistate metropolitan areas*, substantial amounts of criminal activity, traditionally subject to state regulation, are patronized by out-of-state customers. In such a context, *Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources*, and might well produce situations in which the geographical origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies." 401 U.S. 808, 812 (Emphasis supplied).

The Court went on to note that the legislative history did not support the Government's "broad-ranging interpretation" of Section 1952 and that "even if this lack of support were less apparent, ambiguity concerning the ambit of criminal statutes, should be resolved in favor of lenity . . ." (401 U.S. 812). Finally, the Court rejected outright the Government's contention that the Act is violated by one who, in committing one of the prohibited local crimes, can "reasonably forsee" that an interstate facility will be used, saying that ". . . there is little, if any, evidence that Congress intended that forseeability should govern criminal liability" under this Federal statute (401 U.S. 808, 813).

The Seventh Circuit, within days of the decision in *Rewis*, similarly rebuffed a Government effort to have the Anti-

Racketeering Act encompass an essentially local crime merely because of slight interstate involvement. In *United States v. Altobella*, 442 F.2d 310 (7th Cir., 1971), the defendants, Illinois residents, extorted money from a Philadelphia businessman whom they encountered at a Chicago hotel. They lured him to an apartment where, after photographing him in a compromising position, they threatened to inform his wife if he did not pay them $2,500. They drove him to his hotel so that he could cash a check to be drawn on his Philadelphia bank for a $100 down payment. It was undisputed that the defendants "knew their victim was from Philadelphia"; that they "knew he intended to obtain the $100 by cashing a personal check"; that they caused him to cash the check; that the check was sent to Philadelphia from Chicago in the ordinary course of collection; and that one defendant accepted the $100 and "thereafter distributed" half to the other defendant (442 F.2d 310, 318).

Although the interstate movement of the check representing the extortion proceeds supplied some element of the use of an interstate facility, and although the defendants received and distributed the funds after the interstate movement, the Seventh Circuit nevertheless reversed the defendants' convictions, saying:

> "We do not believe Congress intended to authorize federal intervention in local law enforcement in a marginal case such as this. We are guided by the Supreme Court's admonition that in ascertaining the scope of congressional legislation, a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background . . ." 442 F.2d 310, 316.

The Court also quoted the remark of the Attorney General, when the proposed Act was before the Congress, that, "Obviously, we are not trying to curtail the sporadic, casual in-

volvement in these offenses . . ." (442 F.2d 310, 313). It was held that Section 1952 "required a more significant use of a facility in interstate commerce in aid of the defendant's unlawful activity than is reflected on this record," and that, "[W]hen the use of the interstate facility and the subsequent acts are as minimal and incidental as in this case, we do not believe that a federal crime has been committed." See also: *United States v. McCormick*, 442 F.2d 316 (7th Cir., 1971);[4] *United States v. Stagman*, 446 F.2d 489, 493 (6th Cir., 1971).

The principal activity of Petitioner, who was himself a resident of Maryland, was in that State. Baggett was both a Maryland resident and an official of a Maryland county. The tractor was purchased from a Maryland dealer, and, under the Government's theory, was used from time to time on Baggett's Maryland farm. The State statute, which was used as a foundation of the Federal charge, is one which regulates the conduct of State and local officials in Maryland. Other than the writing of the check in the District of Columbia, a mere happenstance, this case has no connection with any jurisdiction other than Maryland. This is not a case involving organized crime. It is not concerned with pervasive multi-state criminality requiring federal assistance to local law enforcement officials and it is not a situation in

[4] There, an Indiana lottery operator advertised for salesmen to peddle lottery tickets in an Indiana newspaper which also had out-of-state circulation, and the Government relied on the interstate mailings of the paper as a basis for jurisdiction. In reversing the defendant's conviction under 18 U.S.C. §1952, the Court of Appeals pointed out that in *Rewis* this Court had "emphasized the intent of Congress to strike at the truly interstate operations of organized crime" (442 F.2d 316, 317). After reviewing *Rewis* and *Altobella*, the Seventh Circuit stated that: "There too the activities engaged in by defendant were essentially local. The role played by the interstate mailings was, 'a matter of happenstance' and 'minimal and incidental' to the operation of the illegal lottery." (442 F.2d 316, 318).

which a person resides in one state and conducts unlawful activities in another. The only act attributed to Petitioner, moreover, in either the indictment or in the proof, was the signing of the check.

IV. IT IS APPROPRIATE, IN A FEDERAL CRIMINAL PROSECUTION IN WHICH VIOLATION OF STATE LAW IS AN ELEMENT OF THE FEDERAL CRIME, TO CERTIFY UNRESOLVED ISSUES OF STATE LAW, WHICH MAY BE DISPOSITIVE OF THE CASE, TO THE HIGHEST COURT OF THE STATE PURSUANT TO THE UNIFORM CERTIFICATION OF QUESTIONS OF LAW ACT.

V. THE COURT BELOW SHOULD HAVE CERTIFIED UNRESOLVED QUESTIONS OF MARYLAND BRIBERY LAW, WHICH MIGHT HAVE BEEN DISPOSITIVE OF THIS FEDERAL CRIMINAL CASE, AND ON WHICH AUTHORITIES FROM OTHER JURISDICTIONS WERE IN CONFLICT, TO THE COURT OF APPEALS OF MARYLAND PURSUANT TO THE UNIFORM CERTIFICATION OF QUESTIONS OF LAW ACT.

As previously noted, Petitioner filed a motion in the Court of Appeals, asking that certain unresolved questions of Maryland bribery law be certified to the Court of Appeals of Maryland under the Uniform Certification of Law Act. Because the certification statute did not go into effect until July 1, 1972, while the appeal was pending, this motion could not have been presented to the district court.

The Court of Appeals denied the motion to certify without assigning any reasons for its action (App. A, p. 3a). The denial, however, was necessarily founded on an acceptance of one of two Government arguments against certification: (1) that illegality under state law is not an essential element in a federal prosecution under 18 U.S.C. §1952, and (2) that certification is inappropriate in a federal criminal case, even one involving state law.

The indictment in this case had alleged, in broad terms, that the unlawful activity for which the interstate facility

was allegedly used, was "bribery of said Jesse S. Baggett, then a member of the Board of County Commissioners of Prince George's County, Maryland, by the said Ralph D. Rocks, in violation of Article 27, Section 23 of the Annotated Code of Maryland (1957) . . ." In pre-trial hearings, and at the trial itself, the Government acknowledged that it would not prove a bribery agreement, either express or implied, nor even any overt bribery discussion, between Petitioner and Baggett. It conceded, further, that its case contained no proof that a tractor would be given or loaned in return for specific acts or otherwise for a specific *quid pro quo* (Hrg. 5/7/70, Tr. 82-84; Hrg. 6/4/70, Tr. 26-31, 52; Hrg. 3/19/71, Tr. 59; Hrg. 9/10/71, Tr. 81, 92-95; Trial Tr. 3249-50, 3263). It also acknowledged that its case involved no showing of improper rulings or official actions by Baggett and no showing that Rocks sought or obtained any result to which he was not otherwise entitled (Hrg. 5/7/70, Tr. 87-88; Hrg. 6/4/70, Tr. 36; Trial Tr. 3378). Instead, terming this a "novel bribery case" (Hrg. 5/7/70, Tr. 82-83), the Government argued that no agreement or discussion between donor and donee is necessary, that a bribe need not be for a specific act or for designated specific acts or for a pending matter, that there need be no showing that the donor sought or secured an undeserved outcome and that a long-standing friendship between the donor and donee, with the former periodically doing favors for the latter, and with the donor having business with the governmental agency of which the donee was a member, was sufficient to establish bribery (*Ibid.*).

In arguing for dismissal of the indictment, and for acquittal on the merits, defense counsel repeatedly objected that the Government's theory and evidence failed in several respects to establish bribery in violation of Maryland law (E.g., Hrg. 5/7/70, Tr. 27-31, 41-42, 44, 98; Hrg. 6/4/70, Tr.

30-31; Trial Tr. 1799, 1806-10, 3112-13; Motions to Dismiss and Motions for Particulars *passim*). In every other prosecution under 18 U.S.C. §1952 involving the state offense of bribery, it was pointed out, there had been an overt agreement or offer to give a public official something of value in return for specific corrupt action in a matter pending before the official.[5] Similarly, in the few reported cases under the Maryland bribery statute, the bribe had consisted of payment for a specific act.[6]

In the certification motion, as in the trial court, it was explained that the authorities throughout the country were divided on the question whether a specific agreement is a necessary element of bribery[7] and also on the question whether a payment, in order to constitute a bribe, must

---

[5] See, e.g. *United States v. Parzow*, 391 F.2d 240, 241 (4th Cir., 1968) (where the court pointed out that the evidence was sufficient to show "that Parzow and Parrish made an *agreement* whereby Parrish voted in favor of *re-zoning a tract of land to permit its use as a shopping center* . . ." in exchange for over $5,000 worth of securities) (emphasis supplied); *United States v. Wechsler*, 392 F.2d 344, 346 (4th Cir., 1968), certiorari denied 392 U.S. 932 (payment of money to local government officials for their votes to re-zone a particular tract of land from residential to mobile homes); *United States v. Corallo*, 413 F.2d 1306, 1311 (2d Cir., 1969) (a negotiated agreement to award a specific governmental contract in return for a 7½ percent kickback); *United States v. Kubacki*, 237 F. Supp. 638, 641 (E.D. Pa., 1965) (an "agreement" that a public official would award a particular contract in return for a cash payment); *United States v. Zirpolo*, 288 F. Supp. 993, 999-1000 (D. N.J., 1968) (agreement that the mayor of a town would grant a particular building permit in return for $50,000).

[6] *Bosco v. State*, 157 Md. 407, 146 A. 238 (1929); *Sugarman v. State*, 173 Md. 52, 195 A. 324 (1937); *Cunningham v. State*, 190 Md. 578, 59 A.2d 337 (1948), and *Glickfield v. State*, 203 Md. 400, 101 A.2d 229 (1953).

[7] Compare *State v. Harrah*, 132 S.E. 654, 655 (W. Va., 1926); *People v. Schneider*, 14 N.W.2d 819 (Mich., 1944); *Selvidge v. State*, 72 S.W.2d 1079, 1080 (Tex., 1934); *Clews v. People*, 377 P.2d 125 (1962); and *White v. State*, 245 S.W.2d 704 (Tex., 1952), all holding that an agreement is necessary; with *Commonwealth v. Donovan*, 49 N.E. 104, 109 (Mass., 1898); *People v. Lyons*, 122 N.E.2d 809 (Ill., 1954); *McLemore v. State*, 125 So. 2d 86, 89 suggestion of error overruled 126 So. 2d 236 (Miss., 1961), appeal dismissed and certiorari denied, 368 U.S. 70.

relate to a specific act or acts rather than a general course of conduct.[8] In *Glickfield v. State*, 203 Md. 400, 101 A.2d 229 (1953), moreover, the Maryland Court appeared to depart from the majority rule throughout the country and to construe the Maryland bribery statute as requiring an intent to bring about an outcome to which the donor was not otherwise entitled.[9]

The Government has never disputed that there are sharp conflicts among the authorities with respect to the bribery law issues previously discussed and that there are no controlling precedents in the Court of Appeals of Maryland on these issues. The Government did suggest, in its opposition to certification, contrary to its position in the trial court, that it had proven a bribery agreement and that the bribe had been for designated specific acts. The Court of Appeals, however, rejected this argument, which had no basis in the record, and, in its opinion in the companion *Baggett* case, it stated that "The Government's evidence did not show a specific *quid pro quo* from Baggett to Rocks in return for the $3,500 check."[10]

---

[8] See 11 C.J.S. "Bribery", Sec. 2, pp. 849-50; *State v. Hazellief*, 148 So. 2d 28 (Fla. App., 1962); *In re Yee Gee*, 83 F. 145 (D. Wash., 1897); *Streeter v. State*, 104 So. 858 (Fla., 1925); *State v. Good*, 156 S.E.2d 8 (W. Va., 1967); *Barefield v. State*, 14 Ala. 603 (1848); *Newman v. State*, 23 S.E. 831 (Ga., 1895); *Azrak v. State*, 183 So. 2d 712 (Fla. App., 1966); *State v. Hibicke*, 56 N.W.2d 818 (Wis., 1953); *Dukehart-Hughes Tractor & Equipment Co. v. United States*, 341 F.2d 613 (Ct. of Claims, 1965).

[9] In that case, where the defendant was charged with attempting to bribe an athlete to affect the score of a game, the Court said that "alteration of outcome" is "implicit in the word 'bribe'" and that, "in the context, we think the bribery of a player refers to a corrupt influence upon his performance with reference to the outcome, in this case, the score" (203 Md. 400, 403). In this respect, the Maryland rule appears to be contrary to the weight of authority. *Cf., United States v. Raff*, 161 F. Supp. 276, 280 (M.D. Pa., 1958), and the cases cited therein; *Sugarman v. State*, 173 Md. 52, 195 A. 324 (1937).

[10] *United States v. Baggett*, No. 72-1548, decided June 19, 1973 and not yet officially reported.

The Government was wholly incorrect in its argument, in opposition to certification, that it was unnecessary to prove that the enterprise, in aid of which the interstate facility was allegedly utilized, was unlawful under state law. This Court, in *United States v. Nardello*, 393 U.S. 286, held otherwise. There, the Court considered the sufficiency of an indictment charging the use of interstate facilities "with intent to carry on" extortion in violation of the laws of Pennsylvania. The indictment, which referred to a specific Pennsylvania statute which prohibited extortion under the title of "blackmail", was held to be sufficient because the terms "extortion" and "blackmail" are synonymous. In its discussion of the Anti-Racketeering Act, this Court noted that "Although Congress directed that content should be given to the term 'extortion' in §1952 *by resort to state law*, it otherwise left that term undefined", concluding that, "Congress intended that extortion should refer to those *acts prohibited by state law . . .*" and that "*the inquiry is . . . whether the particular State involved prohibits the extortionate activity charged*" (393 U.S. 286, 290, 295) (Emphasis supplied). Extortion and bribery are proscribed by the same subsection of Section 1952. In the language of *Nardello*, therefore, it was necessary to inquire whether Maryland prohibited, by Article 27, Section 23 of its Code, the activity charged as bribery in this case. See also: *United States v. D'Amato*, 436 F.2d 52, 53-55 (3rd Cir., 1970); *United States v. Stagman*, 446 F.2d 489, 492, 493 (6th Cir., 1971); and *Dillon v. United States*, 391 F.2d 433, 436 (10th Cir., 1968).

The Government's other argument, that certification is inappropriate in a federal criminal prosecution, but should be limited to diversity cases, has no basis in the language of the Uniform Certification Act or in the decisions of the courts. Section 1 of the Uniform Act provides that certification may be used "in any proceeding" where there are

questions of state law involved and as to which it appears that "there is no controlling precedent" in the decisions of the highest appellate court of the state. The reasons underlying the procedure of certification, set forth and recommended by this Court for the first time in *Clay v. Sun Insurance Office, Ltd.*, 363 U.S. 207, are as applicable to a case such as the present one as to a diversity case.

Finally, this Court and the lower federal courts, other than the Fourth Circuit, have not limited the certification procedure to diversity cases. It has been used in criminal cases and in cases arising under federal statutes. See, e.g., *Dresner v. City of Tallahassee*, 375 U.S. 136 (criminal case arising in state courts); *Norton v. Benjamin*, 220 A.2d 248 (Maine, 1966); *Pierce v. Secretary of Health, Education and Welfare*, 302 F. Supp. 508 (S.D., Me., 1969); *In re Elliott*, 446 P.2d 347 (Wash., 1968).

This case is a novel "bribery" case which calls for the resolution of unusual state legal issues. It arises under a federal statute which incorporates state criminal law and which was specifically designed to assist state law enforcement officials.[11] Moreover, the legal issues in this case go far beyond the scope of normal state criminal law which regulates the conduct of persons generally. Here, we have matters of the State's policy toward its own public officials and toward those who deal directly with those officials. Cf., *Coleman v. Ginsberg*, 428 F.2d 767 (2d Cir., 1970). In light of these factors, certification of the state bribery law issues to the Court of Appeals of Maryland would have been particularly appropriate.

---

[11] House Report No. 966, "Prohibiting Travel or Transportation in Aid of Racketeering Enterprises," 87th Cong., 1st Sess., p. 3. Senate Report No. 644, "Prohibiting Travel or Transportation in Aid of Racketeering Enterprises," 87th Cong., 1st Sess., p. 4.

CONCLUSION

It is respectfully submitted that for the foregoing reasons this petition for a writ of certiorari should be granted.

ARNOLD M. WEINER,
Ten Light Street,
Baltimore, Maryland 21202,

A. KENNETH PYE,
2802 Chelsea Circle,
Durham, North Carolina 27707.

APPENDIX A

In The
United States Court of Appeals for the Fourth Circuit

No. 72-1862

United States of America,
Appellee,

v.

Ralph D. Rocks,
Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey, II, District Judge.

Argued December 4, 1972. Decided June 14, 1973.

Before Haynsworth, Chief Judge and Russell and Widener, Circuit Judges.

Arnold M. Weiner (A. Kenneth Pye on brief) for Appellant; Russell T. Baker, Jr., Assistant United States Attorney, (George Beall, United States Attorney, and Barnet D. Skolnik, Attorney, United States Department of Justice, on brief) for Appellee.

PER CURIAM:

The defendant, Rocks, and Jesse S. Baggett were jointly charged with a violation of the Travel Act.[1] Specifically, they were charged with causing the interstate movement of a $3500 check drawn by Rocks in the District of Columbia which Baggett used in Maryland to purchase a tractor for use on his farm. Baggett, first tried after a severance, was

[1] 18 U.S.C. §1952 and 18 U.S.C. §2.

convicted. Because Baggett's conviction occasioned extensive publicity in Baltimore and Washington, the trial of Rocks was transferred to Norfolk in the Eastern District of Virginia. A jury found him guilty.

From 1954 until he resigned in 1970, Baggett was a member of the Board of County Commissioners of Prince George's County, Maryland. From December 1964 until his resignation, he was the Chairman of that Board. The Board had final authority over all zoning matters and proceedings.

Rocks was a prosperous builder and developer, based in the District of Columbia. Between 1962-1968, he was a frequent applicant for variances and zoning changes in Prince George's County, Maryland. Typically, he sought increased population density rulings and other changes which would enhance the value of lands he had acquired for development and their development potential. His applications usually received favorable action by the Board of County Commissioners until Baggett learned of the governmental investigation of his receipt of the check mentioned above and his use of it for the purchase of the tractor.

Many questions are raised. The most serious ones arise out of the court's handling of a report that some of the jurors, during their deliberations, read or learned of a newspaper article in which the conviction of Baggett was reported, a fact which had not been disclosed to the Virginia jury.

The trial judge conducted an extensive examination of all of the jurors. He permitted counsel to suggest questions to be asked, but he screened them and placed all allowed questions himself. Atferwards, he found that none of the jurors had read the article or had been told of its report of Baggett's conviction until after their verdict.

The several questions arising out of that proceeding were fully discussed in an opinion. *United States v. Rocks*, E. D., Va., 339 F. Supp. 249. For the reasons there stated, we approve the procedures adopted by the trial judge and accept his findings.

The conviction is affirmed.

Affirmed.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE

Upon consideration of the motion to certify unresolved questions of Maryland Bribery Law to the Court of Appeals of Maryland, by counsel,

IT IS ORDERED that the motion is DENIED.

For the Court — By Direction.

/s/ WILLIAM K. SLATE, II,
Clerk.

APPENDIX B

United States of America

v.

Ralph D. Rocks

Crim. No. 230-71-N

United States District Court,
E. D. Virginia

March 9, 1972

HARVEY, District Judge.

After a trial that lasted more than three weeks, Ralph D. Rocks, defendant herein, was found guilty by a jury of a violation of 18 U.S.C. § 1952. Rocks and a co-defendant, Jesse S. Baggett, had been jointly indicted in the United States District Court for the District of Maryland and charged with the offense in question. Criminal No. 28958. A severance was thereafter granted, and Baggett was tried first in Baltimore. On October 27, 1971, the Maryland jury

found Baggett guilty as charged. Because of extensive publicity attending the Baggett trial, Rocks moved for a change of venue, and his case was removed to the Eastern District of Virginia for trial in Norfolk. The Rocks trial commenced on January 3, 1972 and was concluded by a guilty verdict returned by the jury on January 26, 1972.

Rocks has now filed a motion for a new trial based on various grounds. *Inter alia*, Rocks claims that the jury which convicted him was influenced by a newspaper article that appeared in the Norfolk *Ledger Star* on January 25, 1972.[1] He alleges that there were highly prejudicial facts contained in such article, that members of the jury read the article and that when such members of the jury considered the facts contained therein, his constitutional right to be confronted with the witnesses against him under the Sixth Amendment was infringed. In support of this portion of his motion for a new trial, the principal defense attorney filed an affidavit indicating that he had interviewed the foreman of the jury some ten days after the trial was concluded and that in response to such attorneys questions, certain statements had been made by the foreman mentioning the newspaper article in question.

After reviewing the motion and affidavit and conferring with counsel, the Court ordered a post-trial hearing to be held in Norfolk in connection with the questions raised. Briefs were filed, and after the testimony of all 12 jurors was heard in open court, counsel fully argued this aspect of the pending motion.

At conferences before the Rocks trial commenced, the Court had discussed with counsel whether or not the Virginia jury should be advised that the co-defendant Baggett had previously been tried. It was apparent that the fact of such a trial would come to the jury's attention when many of the witnesses who had testified at Baggett's trial were cross-examined at Rocks' trial with reference to their prior

[1] It has been agreed that consideration of the other grounds advanced by defendant in support of his motion will be deferred until after a decision herein.

testimony. Accordingly, over objection by the defendant Rocks, the Court ruled that it would advise the Virginia jury of the fact of the earlier trial but would not advise such jury of its outcome.

On January 3, 1972, in addressing the entire venire to determine if any prospective juror had read or otherwise learned about the previous trial, the Court said the following:

> "There has been a previous trial in this case involving the defendant Baggett. You, the members of the jury, are not to be concerned in any way with the outcome of that previous trial. Whether the defendant Baggett was acquitted, whether he was convicted or whether the trial was terminated in some other way should have no bearing whatsoever on your determination of the guilt or innocence of the defendant Rocks at this trial. You should decide the issues in this case solely on the evidence that is presented in this court room, the testimony of the witnesses and the exhibits that are put in evidence. So for this reason I am not going to tell you the outcome of the previous trial and you should not guess or speculate as to the outcome of that trial. That case has no bearing whatsoever on this one. Now let me ask you this, is there any one who has read about the previous trial? Again, I don't want you to tell us what you may have read or heard on the radio or seen on the television. I'll expand the question to include radio and television. Anybody who may have seen anything in the press or heard anything on the radio or television about the previous trial?"[2]

After the jury had been empanelled further instructions were given by the Court that same day to the twelve jurors and four alternates who were to hear the case, as follows (Tr. 6-7):

> "Now, it is very important that you not read anything in the newspapers about this case. Furthermore, it is

[2] The reporter's notes indicate that there was no response to this inquiry.

very important that you not look at any newspapers of yesterday or the day before or in the last week or so, that may have had something about this case in it.

"Furthermore, if there should be anything on the radio that you hear, in which this case is mentioned, please turn it off; don't listen to it, don't look at anything on television having to do with this case.

"It is extremely important that the only evidence which you should consider, the only information about the case which you should consider is that which you will hear right in this courtroom, either from witnesses, or by way of exhibits that are put in evidence.

"If anyone should talk to you about this case, please don't discuss it, don't discuss it even with your spouses or members of your family; and if anyone from the outside comes up and tries to talk to you about the case, please report it to me; because what you will decide this case on will be what you hear right in the courtroom and not what you may hear from someone on the outside."

These instructions were repeated, regularly throughout the trial (Tr. 389, 646, 1096, 1788, 2310). In the Court's final charge to the jury, which was delivered on January 25, 1972, the following was said (Tr. 3407, 3426):

"You will note that the indictment charges both the defendant Jesse S. Baggett and the defendant Ralph D. Rocks with committing the crime in question. For reasons that are of no concern to you, only the defendant Rocks has been tried in this case. The defendant Baggett was tried at an earlier date. As I have previously told you, you are not to be concerned in any way with the outcome of that previous trial. You have not been advised of the outcome of the Baggett trial because it has no bearing whatsoever on your determination of the guilt or innocence of the defendant Rocks in this trial. You are not to guess or speculate as to the outcome of the Baggett trial, and you are not to attach any significance to the fact that the defendant Baggett has previ-

ously been tried in Maryland and that the defendant Rocks has now been tried here in Virginia.

* * * * * *

"Now, during the trial of this case I have repeatedly instructed you not to read, listen to or observe any news stories concerning this case in newspapers, on radio or on television. In the event that any publicity in the news media may have come to your attention inadvertently or otherwise, I now instruct you to completely disregard any facts thereby brought to your attention. Your verdict may not be based upon anything which you may have heard outside the courtroom. The only evidence which you may consider in reaching your verdict is the evidence produced by way of witnesses who testified during the trial or by way of exhibits admitted in evidence."

The jury retired to commence its deliberations on January 25, 1972, at 11:20 A.M. At 4:55 P.M., the jury sent a note to the Court requesting permission to go home that evening and return to continue their consideration of the case the next morning. With the approval of counsel, the jury was permitted to disband for the evening and was instructed to return to resume its deliberation the next morning at 9:30 A.M. The following additional instruction was given to the jury before it was excused that evening (Tr. 3455):

"Now, it is particularly important tonight that you not consult with anyone, not with each other. Don't call another juror and discuss anything to do with this case or the deliberations. Don't discuss it with anyone at home and I would suggest that tonight and tomorrow morning you not read any newspapers at all and try not to listen to the radio or view anything on television, if there should be anything in the press relating to this case.

"If anyone approaches you and tries to discuss the case with you in any way between now and tomorrow morning when we will resume, you should bring it to my attention tomorrow morning.

"At this stage, with deliberations underway, it is very, very important that you not discuss the case with anyone at all.

"So the jury will be excused and we'll keep the exhibits in the jury room and lock the jury room if we can. You will be excused and we will return here in the courtroom tomorrow morning at 9:30."

That same afternoon, January 25, 1972, the following article had been printed in the *Ledger Star*, a Norfolk newspaper of general circulation:

"JURY OUT IN TRIAL FOR ZONING BRIBERY

"NORFOLK — A U.S. District Court jury here began deliberations about 11 a.m. today in the trial of a Washington area developer charged with bribing a former Prince Georges County, Md., commissioner for favorable consideration of a zoning application.

"Ralph D. Rocks, 54, president of the Rocks Engineering Co., was named in a federal indictment in December, 1969, charging him with bribing former Commissioner Jesse S. Baggett seven years ago with a $3,500 tractor.

"The trial opened here Jan. 2 with testimony from the government that Rocks' Washington, D.C.-based firm sent a check dated Dec. 23, 1964, to Maryland for $3,500 with intent to bribe Baggett, 62.

"U. S. District Court Judge Alexander Harvey II of Maryland has been hearing the case for the past three weeks here.

"The trial was transferred to the Norfolk district court after Rocks' attorneys, Ronald S. Liebman and Arnold M. Weiner, argued successfully that the 'flood' of publicity growing out of the Baggett trial in October, made the selection of an unbiased jury improbable.

"Baggett, also charged in a similar indictment, was convicted following his 15 days of trial in Maryland of

accepting a bribe. Sentencing in his case has been delayed pending the outcome of Rocks' case.

"Baggett could receive up to five years in prison and a $10,000 fine as punishment.

"The indictment naming both men was one of four which grew out of a three-year federal investigation into allegations of rezoning irregularities in the Maryland suburbs of Washington in the early and mid-1960's.

"Baggett was a commissioner during the years of Prince George's most rapid growth.

"Rocks' enterprises included developments in Montgomery County, Washington, Virginia and Florida.

"The developer was acquitted last year along with another man, Rogers H. Israel, former president of Loyola Federal Savings & Loan Association of Baltimore, with federal fraud and conspiracy involving $2.6 million in construction loan funds."

The next morning, January 26, 1972, the members of the jury reconvened, resuming their deliberations at about 9:30 A.M. At 10:20 A.M., the jury returned with a verdict of guilty on the one count indictment.

Defendant contends that one or more of the jurors read the newspaper article in question and that his constitutional right to be confronted with the witnesses against him was thereby infringed. In order to inquire into the facts alleged in the motion and in the affidavit submitted by defense counsel, an evidentiary hearing was held on February 23, 1972. The twelve jurors who rendered the verdict were subpoenaed and each of the jurors testified in open court under oath. Examination of the jurors was conducted by the Court itself. The Court had previously conferred with counsel concerning the scope of the inquiry, and counsel had been given an opportunity to submit in advance appropriate questions. Defense counsel had further requested the right to cross-examine each juror witness. This request was denied, but the

Court permitted counsel on both sides to suggest further questions after the Court's questioning was completed and many of these questions were in fact asked by the Court. After all twelve jurors had been examined by the Court, eight of them were recalled for further questioning suggested by the testimony that had then been received.

With limited exceptions, it is a settled rule that a juror's testimony is not receivable to impeach his own verdict. *Young v. United States*, 163 F.2d 187, 188 (10th Cir. 1947), *cert. den.* 332 U.S. 770, 68 S. Ct. 83, 92 L. Ed. 355 (1947); *Rakes v. United States*, 169 F.2d 739, 745 (4th Cir. 1948), *cert. den.* 335 U.S. 826, 69 S. Ct. 51, 93 L. Ed. 380 (1948); *United States v. Rees*, 193 F. Supp. 861 (D. Md. 1961). The inviolability of the jury room from outside influence of any sort is a prime necessity in the administration of justice. *Rakes v. United States, supra*, 169 F.2d at 745. As the Supreme Court said in *McDonald v. Pless*, 238 U.S. 264, 267, 35 S. Ct. 783, 784, 59 L. Ed. 1300 (1915), if there were not strict limits to inquiries into jury verdicts after they had been returned, then jurors "would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict." Wright & Miller, Federal Practice and Procedure, § 554, p. 493, 494.[3] Litigation must be terminated at some reasonable point and if jurors could, without limitations, be examined concerning their deliberations and their verdicts, the result would be to make what was intended to be a private deliberation into a constant subject of public investigation impeding frankness and freedom of discussion in the jury room. *Idem*, at 268, 35 S. Ct. at 784; Annotation, 58 A.L.R.2d 556, 559 (1958).

In *United States v. Crosby*, 294 F.2d 927, 950 (2d Cir. 1961), *cert. den. Mittleman v. United States*, 368 U.S. 984, 82 S. Ct. 599, 7 L. Ed. 2d 523 (1962), the Court listed the dangers inherent in a post-verdict inquiry into jury verdicts as follows (at 950):

---

[3] See also American Bar Association Minimum Standards Relating to Trial by Jury, §5.7(c)(i).

> "There are many cogent reasons militating against post-verdict inquiry into jurors' motives for decision. The jurors themselves ought not be subjected to harassment; the courts ought not be burdened with large numbers of applications mostly without real merit; the chances and temptations for tampering ought not be increased; verdicts ought not be made so uncertain."

[2, 3] An exception to the general rule limiting post-verdict examination of jurors is recognized when it appears that matters not in evidence may have come to the attention of one or more jurors so as to violate the defendant's constitutional right to be confronted with the witnesses against him. *Parker v. Gladden*, 385 U.S. 363, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966). Thus, a juror may testify to facts bearing upon the question of the existence of any such extraneous influence, but not as to how far that influence operated upon his mind. *Mattox v. United States*, 146 U.S. 140, 13 S. Ct. 50, 36 L. Ed. 917 (1892); *Remmer v. United States*, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654 (1954); *Holmes v. United States*, 284 F.2d 716 (4th Cir. 1960); *Downey v. Peyton*, 451 F.2d 236 (4th Cir. 1971); *United States v. Rees, supra.* A new trial is mandatory if it appears in a criminal case that individual jurors have read newspaper articles containing incompetent and prejudicial information. *Holmes v. United States, supra.* However, the manner in which a Court should determine whether a jury has been subjected to outside influence should be left to the discretion of the trial judge. *Marshall v. United States*, 360 U.S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250 (1959). As the Supreme Court said in that case (at page 312, 79 S. Ct. at page 1173):

> "The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. *Holt v. United States*, 218 U.S. 245, 251, [31 S. Ct. 2, 6, 54 L. Ed. 1021]. Generalizations beyond that statement are not profitable because each case must turn on its special facts."

Pursuant to the authorities cited hereinabove, this Court ordered that a post-trial evidentiary hearing be held. How-

ever, the inquiry was strictly limited to the alleged outside influence, namely, whether the newspaper article in question or the statements made therein had come to the attention of any member of the jury between 5:00 P.M. on January 25 and 10:20 A.M. on January 26 when the verdict was returned. To prevent impermissible questioning of the jurors beyond this limited scope of the hearing, the Court itself examined each juror.

After consideration of the testimony at the hearing, this Court finds that, before the verdict was rendered, none of the jurors read the contents of the article that appeared in the *Ledger Star* on January 25, 1972. This Court further finds that the matters referred to in such article were not discussed in the jury room on the morning of January 26, nor did they otherwise then come to the attention of the jury. Only one juror noticed the article in the newspaper that evening. Juror Bowers testified that he read the headline of the article, but because of the Court's instructions, did not read the article itself.[4] Juror Early testified that he heard some one in the jury room ask if anyone had seen anything in the newspapers. He did not remember who made this inquiry, but he did recall that the response was "No, they hadn't saw anything." Juror Neese testified that on the morning of January 26 she heard one or more other jurors mention in the jury room the fact that an article had appeared in the paper. She did not remember who was involved. She did not hear any discussion of the facts mentioned in the article, and she characterized what she heard as "muddled conversation."[5]

[4] Except for the testimony of Jurors Bowers, Early and Neese as mentioned hereinabove, each of the 12 members

---

[4] Juror Bowers remembered the headline as saying that "the Rocks case was presented to the jury." He apparently received an earlier edition of the newspaper than that put in evidence. After reading the headline, he passed the newspaper to his wife and read the article itself after the case was over.

[5] It is likely that what Juror Neese heard was the inquiry that Juror Early heard, namely, whether any one had seen anything in the newspapers. No other juror remembered hearing any comment in the form that Juror Neese believed she heard it.

of the jury in turn testified under oath that he or she did not see the article in question, that no one else either in the jury room or outside brought the article or the matters therein to his or her attention, and that he or she did not hear any of the other jurors discussing on the last morning of the trial the article or any of the facts mentioned therein.[6] Considering the testimony in its entirety, this Court concludes that the matters set forth in the newspaper article in question did not before the verdict was rendered come to the attention of one or more jurors in such a way as to deny defendant's constitutional right to be confronted with the witnesses against him.[7] See *United States v. Gibas*, 300 F.2d 836, 840 (7th Cir. 1962), *cert. den.* 371 U.S. 817, 83 S. Ct. 32, 9 L. Ed. 2d 58 (1962).

[5] In support of his motion, defendant advances two principal arguments. First, defendant claims that he was denied his right of cross-examination when the Court undertook to question the jurors itself. But, when a post-verdict evidentiary hearing is held, a convicted defendant does not have an unlimited right to cross-examine juror witnesses. *Miller v. United States*, 403 F.2d 77, 81-84 (2d Cir. 1968). As Judge Friendly said, speaking for the Court in that case, at page 82:

> "Especially because the line between proper and improper inquiry is not easy to draw, * * * and because the jurors may be in doubt about the proprieties, the judge may well find it better that he control any questioning, whether by having it done in open court, as the Supreme Court directed in *Remmer v. United States*, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654 (1954), by allowing deposi-

[6] Each juror witness was given the newspaper article to read while on the stand and was asked specifically whether he or she had heard any discussion in the jury room that final morning of the facts mentioned therein. All 12 jurors testified that they heard no such discussion.

[7] The disparity between the actual facts and the allegations of the motion which impelled this Court to order a post-trial hearing suggests the desirability of a rule such as that mentioned in *Miller v. United States, infra*, at 82, which would prohibit questioning of a juror by an attorney after a verdict except by leave of court.

tions where the prosecutor would have an opportunity to object to improper questions, or *by passing in advance on the questions sought to be propounded.*" (Emphasis added).

[6] With reference to the post-verdict hearing held in this case, this Court did in fact pass in advance on the questions sought to be propounded to the juror witnesses and then interrogated the jurors itself. Counsel were permitted to suggest additional questions after the Court had completed its questioning of each juror witness.[8] A number of the jurors were recalled to the stand so that additional matters might be inquired into by the Court. In this manner, the questioning of the juror witnesses was confined to the issue of the existence of the alleged extraneous influence and was not permitted to include any inquiry into the jurors' actual deliberations nor the reasons for their verdict. That defense counsel wished to inquire into impermissible subjects in questioning the juror witnesses quite clearly appears from the questions that he submitted in advance of the hearing. Defendant's attorney requested the Court to ask the jurors whether the fact that Baggett had been convicted in Baltimore had ever been discussed by any of the jurors during the jury deliberations. The Court refused to ask this question as well as several others which sought to inquire into the substance of deliberations occurring before the morning of January 26, 1972.

United States v. Guthrie, 387 F.2d 569 (4th Cir. 1967), is not to the contrary. There the question as to private communications between a government witness and a juror was raised for the first time during the pendency of the appeal. The issue had therefore been presented to the Fourth Circuit by means of the submission of ex parte affidavits. The Court, noting that the fact that an alleged conversation had taken place was not disputed, remanded the case so that the defendants might have a hearing and an opportunity to

[8] Numerous bench conferences were held while juror witnesses were on the stand, and counsel's suggested additional questions were made a part of the record.

cross-examine. In *Guthrie*, the Court was not presented with any questions as to the extent that a juror might be interrogated by defense counsel after such juror had denied under oath the existence of any extraneous influence. At the post-verdict hearing in this case, defense counsel was not permitted to challenge or contradict testimony under oath by individual jurors that they had not read the newspaper article in question. To have permitted such challenge would have resulted in the type of harassment and "searching hostile inquiry" condemned in *Rakes v. United States*, *supra*, 169 F.2d at 745.

Secondly, defendant argues that the testimony adduced at the post-verdict hearing indicates that several jurors did in fact read and discuss the contents of the newspaper article in question. Defendant claims that it was the newspaper article which caused the jury to reach agreement so quickly on January 26. In the late afternoon of January 25, before the jury was sent home for the evening, the jury stood 9 to 3 for conviction. The next morning after some 30 to 40 minutes of further deliberation, another vote was taken and all 12 jurors voted for conviction. Defendant contends that the facts set forth in the newspaper article came to the attention of the 3 holdouts between 5 o'clock P.M. and the time that the final vote was taken the next morning and that such facts caused the minority to change their votes. Such contention amounts to no more than conjecture on the part of defense counsel. Like the other 9 jurors, the 3 holdouts all testified that they had not read the newspaper article and that none of the facts set forth in the article came to their attention either outside of the court room or during their deliberations on the final morning of the trial.

Defendant relies particularly on the testimony of Juror Neese and on the testimony of four other jurors who met and discussed the case in a restaurant across the street from the courthouse after the verdict had been returned and the jury discharged. Juror Neese, after testifying that she heard one or more of the jurors mention the fact that an article had appeared in the paper, said that she "would suppose" that the three holdouts were discussing the article when she saw

them talking to each other in the jury room on the final morning of the trial. When pressed by the Court, she admitted that she was some distance away, that she was not paying too much attention and that she actually could not hear what these three were talking about although she could say for sure that they were talking together. When considered in its entirety, the testimony of Juror Neese does not support defendant's claim that the facts set forth in the newspaper article came to the attention of and were considered by the three holdout jurors. Nor does any of the other testimony. Whatever may have caused these three to change their minds on the last morning of the trial, the evidence does not show that it was the newspaper article in question.

After the jury was discharged, seven of the twelve jurors went across the street to the Dutch Kitchen Restaurant for coffee.[9] Four of the seven remembered hearing something said at the restaurant concerning a newspaper article relating to the case. Apparently, no one of the jurors was paying much attention to the conversation in question because none of the four could remember who mentioned the newspaper article at that time and each gave a different version of what was said.[10] Juror Levine testified that she did not know "who said what" because she was giggling and laughing and fooling around with the waitress. Juror Bowers described the talk at the Dutch Kitchen as "a bunch of foolishness." After considering the testimony of the four who heard something mentioned about the article and comparing the testimony of each with the others, this Court accepts the version given by Juror Stearns.[11] She testified that she heard someone say "I wonder if they read it in the

[9] The 3 holdout jurors were not in this group.

[10] There were others in the restaurant at the time the seven jurors met for coffee, including waitresses and other customers who joined in the banter. It is not entirely clear from the testimony whether the reference to the newspaper article was made by a juror or by some one else then in the Dutch Kitchen.

[11] Jurors Stearns, Miller (the foreman), Levine and Bowers were the ones who remembered that something was said at the Dutch Kitchen about a newspaper article. The other three jurors who were there that morning did not recall any such discussion.

paper." Apparently several of the jurors were speculating as to the reason why the three holdouts changed their minds and voted for a conviction on the last morning of the deliberations. Juror Bowers knew that an article on the trial had appeared in the paper the night before. He could not remember at the time that he testified whether he had mentioned this to the others in the restaurant or not. It would appear that he probably did and that several jurors then engaged in speculation that the three holdouts had seen the article and had been influenced in some way by the newspaper article. Or general discussion may have begun when some one of those present remembered hearing what Juror Early heard, namely, one juror asking another whether he had seen anything in the newspapers.

Considered in its entirety, the testimony discloses that the discussion at the Dutch Kitchen after the jury had been discharged amounted to no more than pure conjecture by certain jurors as to the mental processes of other jurors. As this Court has found, the evidence establishes that the three jurors in question had not seen the article nor had the facts in the article been brought to their attention. Defendant would convert idle gossip and banter occurring after the conclusion of a long case into a finding that the jury was influenced by extraneous matters. A comparison of what actually transpired at the restaurant after the verdict had been returned with defendant's interpretation thereof emphasizes the soundness of the rule that a juror's testimony should not be receivable to impeach his verdict except as to very limited subjects and then only if carefully supervised by the Court.

For the reasons stated, defendant is not entitled to a new trial on the ground that his Sixth Amendment rights were infringed because of any extraneous influence on the jury. No Order will be entered at this time, pending a further hearing in connection with the other grounds advanced by defendant in support of his motion for a new trial.

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. 1952:

Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

Article 27, Section 23, of the Annotated Code of Maryland:

If any persons shall bribe or attempt to bribe any executive officer of the State of Maryland, any judge, justice of the peace or other judicial officer of this State, any member or officer of the General Assembly of Maryland, any officer or employee of the State, or of any county,

municipality or other political subdivision of the State, including members of the police force of Baltimore City and the State Police or any member or officer of any municipal corporation of this State, or any executive officer of such corporation, in order to influence any such officer or person in the performance of any of his official duties; and if the Governor or other executive officer of this State, any judge, justice of the peace or other judicial officer of this State, any member of the General Assembly of Maryland or officer thereof, any officer or any employee of the State, or of any county, municipality or other political subdivision of the State, including members of the police force of Baltimore City and the State Police or any member or officer of any municipal corporation, or mayor or other executive officer thereof in this State shall demand or receive any bribe, fee, reward or testimonial for the purpose of influencing him in the performance of his official duties, or for neglecting or failing to perform the same, every such person so bribing or attempting to bribe any of such officers or persons, and every such person so demanding or receiving any bribe, fee, reward, or testimonial shall be deemed guilty of bribery, and on being convicted thereof shall be fined not less than one hundred dollars or more than five thousand dollars, or, in the discretion of the court, shall be sentenced to be imprisoned in the penitentiary of this State for not less than two nor more than twelve years, or both fined and imprisoned, and shall also be forever disfranchised and disfranchised and disqualified from holding any office or trust or profit in this State; and any person so bribing or attempting to bribe or so demanding or receiving a bribe shall be a competent witness, and compellable to testify against any person or persons who may have committed any of the aforesaid offenses; provided, that any person so compelled to testify in behalf of the State in any such case shall be exempt from prosecution, trial and punishment for any such crime of which such person so testifying may have been guilty or a participant therein, and about which he was so compelled to testify.

Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Chapter 427 of the Laws of Maryland of 1972:

> AN ACT to add new Sections 159 to 170, inclusive, to Article 26 of the Annotated Code of Maryland (1966 Replacement Volume and 1971 Supplement), title "Courts," to follow immediately after Section 158 thereof and to be under the new subtitle "Uniform Certification of Questions of Law Act," authorizing the Court of Appeals of Maryland to answer questions of law certified to it by certain Federal Courts, providing generally for the procedure for the handling and determination of these certifications, establishing also a procedure whereby the Court of Appeals or the Court of Special Appeals may seek a certification of a question of law from the highest court of another State and relating generally to the certification of law to and from certain courts of this State.

Section 1. Be it enacted by the General Assembly of Maryland, That new Sections 159 to 170, inclusive, be and they are hereby added to Article 26 of the Annotated Code of Maryland (1966 Replacement Volume and 1971 Supplement), title "Courts," to follow immediately after Section 158 thereof, to be under the new subtitle "Uniform Certification of Questions of Law Act," and all to read as follows:

159.

The Court of Appeals may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or a United States District Court when requested by the certifying court if there is involved in any proceeding before it a question of law of this State which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Court of Appeals of this State.

160.

This subtitle may be invoked by an order of any of the courts referred to in Section 159 upon the court's own motion or upon the motion of any party to the cause.

161.

A certification order shall set forth

(1) the question of law to be answered; and

(2) a statement of all facts relevant to the question certified and showing fully the nature of the controversy in which the question arose.

162.

The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the Court of Appeals by the clerk of the certifying court under its official seal. The Court of

Appeals may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of the Court of Appeals, the record or portion thereof may be necessary in answering the question.

163.

Fees and costs shall be the same as in civil appeals docketed before the Court of Appeals and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

164.

Proceedings in the Court of Appeals shall be those provided in Maryland Rules of Procedure.

165.

The written opinion of the Court of Appeals stating the law governing the question certified shall be sent by the clerk under the seal of the Court of Appeals to the certifying court and to the parties.

166.

The Court of Appeals or the Court of Special Appeals of this State, on its or their own motion or the motion of any party, may order certification of a question of law to the highest court of any state if it appears to the certifying court there is involved in any proceeding before the court question of law of the receiving state which may be determinative of the case then pending in the certifying court and it appears to the certifying court that there are no controlling precedents in the decisions of the highest court or intermediate appellate courts of the receiving state.

167.

The procedures for certification from this state to the receiving state shall be those provided in the laws of the receiving state.

168.

If any provision of this subtitle or the application thereof to any person, court, or circumstance is held invalid, the invalidity does not affect other provisions or applications of the subtitle which can be given effect without the invalid provision or application, and to this end the provisions of this subtitle are severable.

169.

This subtitle shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

170.

This subtitle may be cited as the Uniform Certification of Questions of Law Act.

Sec. 2. And be it further enacted, That this Act shall take effect July 1, 1972.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ARNOLD M. WEISSMAN,
Ten Light Street,
Baltimore, Maryland 21202

A. KENNETH PYE,
2202 Chelsea Circle,
Durham, North Carolina.

The Daily Record Co., Baltimore, Md. 21203

TABLE OF CONTENTS

	PAGE
SUPPLEMENTAL BRIEF	1
APPENDIX:	
United States of America v. Archer, United States Court of Appeals for the Second Circuit, Nos. 73-1527, 73-1528, 73-1711, decided July 12, 1973, not yet reported	1a

TABLE OF AUTHORITIES

Cases

Erlenbaugh v. United States, 409 U.S. 239	3
Rewis v. United States, 401 U.S. 808	2
United States v. Archer, U. S. Court of Appeals for the Second Circuit, Nos. 73-1527, 73-1528, 73-1711, decided July 12 ,1973, not yet reported	1, 2, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73–116

RALPH D. ROCKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

This supplemental brief is submitted for the purpose of calling attention to a new case, not available at the time of the filing of the petition for certiorari, which bears directly upon the third question presented for review by the petition. On July 12, 1973, the Court of Appeals for the Second Circuit filed its opinion and entered judgment in *United States v. Archer.* The *Archer* opinion, not yet reported, appears as the Appendix hereto.

Judge Friendly, writing for the Court in *Archer*, observed that there now appears to be a clear conflict between the cases from the Fourth Circuit, on the one hand, and those of the Second and Seventh Circuits, on the other, as to

extent of interstate use necessary to transform a local offense into a violation of the Anti-Racketeering Act, 18 U.S.C. §1952 (App. 18a, n. 12). The conflict results from divergent views as to the impact of this Court's decision in *Rewis v. United States*, 401 U.S. 808, with the Fourth Circuit adhering to its earlier decisions, construing the federal statute literally and giving *Rewis* no effect, and with the Second and Seventh Circuits holding that this Court, by *Rewis*, has required that "the Act is not to be stretched to the limits of its language" and that casual, sporadic, incidental or happenstance uses of interstate facilities are insufficient to constitute the Federal crime (App. 17a, 18a). As the *Archer* opinion illustrates, moreover, the Anti-Racketeering Act continues to be a favored prosecutorial tool, and this troublesome disagreement over the reach of the statute will recur until such time as it is resolved finally by this Court (App. 12a, 13a).

The interstate uses in *Archer* were telephone calls in connection with a bribe accepted by a local prosecutor in New York. Bribery discussions, which culminated in the payment of $15,000 in marked money in return for dismissal of a local charge, included three telephone calls, by the prosecutor's associates, to an undercover Federal agent in Paris, Las Vegas and Newark. The Second Circuit held that the defendants' course of conduct was essentially local and that the calls were insufficient to bring their wrongdoing within the scope of the Federal crime, saying, *inter alia*, that:

> "Today there is widespread concern whether the federal criminal law has not outrun reasonable bounds . . .
>
> * * * * * *
>
> "The legislative history affords little indication of Congressional awareness of the enormous reach the statute could have if literally interpreted.
>
> * * * * * *

"The source of the statute, which was adopted with remarkable speed and little discussion, was a bill forwarded to Congress by Attorney General Kennedy on April 6, 1961 . . . The target of the Act, he said, 'clearly is organized crime' . . . Yet the bill he submitted, if read literally, would cover a $10 payment to fix a traffic ticket if only the person desiring the fix walked across a state line to pay off the policeman.

* * * * * *

"While the precise holding of *Rewis* was that the proprietors of a Florida gambling establishment did not violate the Travel Act merely because some of their customers came from Georgia, a course of action forseeable and even designed, the opinion indicates that the Act is not to be stretched to the limits of its language. The Court stated, 401 U.S. at 811, that the legislative history revealed 'that §1952 was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another.' The warnings that 'Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships' and 'could overextend limited federal police resources,' 401 U.S. at 812, are not without relevance here. These observations were reiterated in *Erlenbaugh v. United States*, 409 U.S. 239, 247, n. 21 (1972)." (App. 12a, 14a, 17a).

The convictions were reversed with directions that the indictment be dismissed.

The present case is a particularly appropriate vehicle for resolution of the question. As indicated by the opinion below, the indictment here charged a single interstate use, the transmission of a check across the D. C.-Maryland line. All of the events comprising the alleged crime, except for the signing of the check in D. C., took place in the State of Maryland. The Fourth Circuit, consistent with its literal approach to the statute, criticized by Judge Friendly in

Archer (App. 18a, n. 12), dismissed summarily the contention that this incidental use of an interstate facility was insufficient to invoke the operation of the Federal Act. The result is manifestly opposite from that which would have been reached were this case to have been brought in the Second or Seventh Circuits.

Respectfully submitted,

ARNOLD M. WEINER,
Ten Light Street,
Baltimore, Maryland 21202

A. KENNETH PYE,
2802 Chelsea Circle,
Durham, North Carolina.

APPENDIX

United States Court of Appeals
For the Second Circuit

September Term, 1972

Nos. 1039, 1040, 1041

(Argued June 22, 1973 Decided July 12, 1973)

Docket Nos. 73-1527, 73-1528, 73-1711

United States of America,

Appellee,

v.

Norman Archer, Frank R. Klein and Leon Wasserberger,

Defendants-Appellants.

Before:

Friendly, Feinberg and Mansfield, Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Charles H. Tenney, *Judge*, convicting defendants, after a verdict, on both counts of an indictment charging them with using telephone facilities in interstate and foreign commerce to commit bribery in violation of 18 U.S.C. § 1952, and with conspiring to commit the same offense. Reversed, with instructions to

dismiss the indictment for failure of the evidence to show a crime against the United States.

Irving Anolik, Esq., New York, N. Y., *for Defendant-Appellant Norman Archer.*

Milton S. Gould, Esq., New York, N. Y. (Shea, Gould, Climenko & Kramer, New York, N. Y., of counsel), *for Defendant-Appellant Frank R. Klein.*

John L. Pollok, Esq., New York, N. Y. (Edward Gasthalter, Esq., and Lenefsky, Gallina, Mass, Berne & Hoffman, New York, N. Y., of Counsel), *for Defendant-Appellant Leon Wasserberger.*

Richard Ben-Veniste, Assistant United States Attorney, New York, N. Y. (Paul J. Curran, United States Attorney for the Southern District of New York, and Kenneth R. Feinberg and Richard J. Davis, Assistant United States Attorneys, of Counsel), *for Appellee.*

Friendly, *Circuit Judge:*

This case arises from what the Government characterizes as "part of an intensive combined Federal and local investigation into the nature and extent of corruption within the New York criminal justice system." Its brief tells us that the investigation "was premised on the belief that attempts to combat corruption in the criminal justice system" — to wit, New York City's — "through uncovering incidents of past wrongdoing had failed." It was essential the Government insists, to arrange "undercover penetration into ongoing corrupting activities" by having "a federal agent assume the role of a potential consumer of corruption." We do not at all share the Government's pride in its achievement of causing the bribery of a state assistant district attorney by a scheme which involved lying to New York police officers and perjury before New York judges and grand jurors; to our minds the participants' attempt to set up a federal crime for which these defendants

stand convicted went beyond any proper prosecutorial role and needlessly injected the Federal Government into a matter of state concern.[1] However, we base our reversal of these convictions and our instruction to dismiss the indictment on the more limited ground that the Government did not provide sufficient proof of use or agreement to use interstate or foreign telephone facilities to satisfy the requirements of the so-called "Travel Act," 18 U.S.C. § 1952.

The plan for setting up a crime was conceived at a February 1972 meeting attended by Thomas Taylor, the Regional Director of the Bureau of Narcotics and Dangerous Drugs (BNDD); several special agents of the Bureau, including one Sante A. Bario; Vincent Murano, a New York City police officer; and two Assistant United States Attorneys for the Southern District of New York. According to the plan, Bario would assume the name Salvatore Barone and pose as a resident alien and member of the Las Vegas underworld. Murano would then "arrest" Bario in Queens County on the phony charge of the unauthorized possession of two loaded pistols, a felony under § 265.05 of the New York Penal Law. After his arraignment, Bario would make it known that he would be willing to pay a considerable sum to avoid trial or conviction on the charge. With Bario as bait, the planners hoped that some evidence of corruption would surface and that some use of interstate facilities would occur or could be arranged so that the incident of corruption would be transformed into a violation of the Travel Act.

Pursuant to the scheme, Taylor gave Bario two loaded pistols, a fake Nevada driver's license, and a false immigration card issued by the Immigration and Naturalization

[1] A special prosecutor has since been named by the Governor of New York to investigate precisely the kind of corruption in offices of New York City district attorneys at which the federal prosecutor's activities here were aimed.

The act of bribery that formed the basis for the federal prosecution here was not itself a federal crime, but a violation of §§200.00 and 200.10 of the New York Penal Law. That violation became a federal offense, according to the Government's theory, when interstate facilities were used to aid in committing it.

Service in Washington at the request of the Director of the BNDD. The next morning Murano effected the staged arrest at a diner in Queens. Murano then took Bario to a precinct house and filed a complaint and arrest affidavit falsely charging him with the unauthorized possession of loaded weapons.[2] Bario, in turn, lied about his name, his address, his marital status and his employment, produced the false Nevada driver's license and immigration card, and then certified to the correctness of the false report he had made. When a police officer at the precinct became suspicious about the immigration card, Bario had Murano call Taylor so that the latter could arrange for appropriate falsification of records in the Immigration and Naturalization Service in Washington. Subsequent to arraignment in Queens County Criminal Court, at which Bario lied about his identity, he was admitted to bail. A special agent of the Bureau of Narcotics, posing as Bario's father, "C. Barone," subsequently posted Bario's bail, which had been set at $5,000. After three adjournments, a preliminary hearing was waived and the case was forwarded for presentation to the grand jury.

Nicholas DiStefano, a figure not unknown to this court, see *United States v. DiStefano*, 464 F.2d 845 (2 Cir. 1972), who, the Government tells us, "was cooperating in a limited manner with the United States Attorney's Office," was then brought upon the stage. On April 19, DiStefano introduced Bario to defendant Wasserberger, an associate of a Manhattan bail bondsman. Wasserberger told Bario he was aware of the latter's arrest and had already spoken to a Queens attorney with "big connections," to wit, defendant Klein. Bario responded that he was "not interested just in any lawyer," but was "under the opinion that something more effective could be done." Wasserberger repeated that Klein had "strong connections" and that he could "do something" for Bario. When Wasserberger suggested that they drive to Klein's office, Bario agreed. While enroute, Wasserberger told Bario "it was too bad the

[2] Murano testified that he had done all this on the instructions of the two Assistant United States Attorneys.

case went before the grand jury, because it could have been taken care of before the lower court." Bario then said he "could not afford to be seen in a courtroom" and asked "what could be done." Wasserberger answered that they must try to "get the case kicked out before it went any further."

On meeting Klein, Bario first declined a proposal that he plead to a misdemeanor charge. Klein then echoed Wasserberger's advice that "the only thing then left to do was to have the grand jury return no indictment." To arrange that, Klein added, would cost a lot of money — probably between $10,000 and $15,000 in cash. He sought a telephone number where he could reach Bario in Las Vegas; Bario responded, truthfully for once, that he would be out of the country and that he would call Klein instead. Klein promised to have "an answer" by April 25 at the latest. Bario then paid Klein a $500 "retainer" and departed with Wasserberger. On the ride back to Manhattan, Wasserberger explained that part of the total payment would have to go to the assistant district attorney who would be in charge of the presentation to the grand jury. When Wasserberger asked how he could reach Bario in Las Vegas if that became necessary, Bario responded that he could be contacted by paging at the Sahara Hotel or, if that did not succeed, by leaving a message with the hotel telephone operator. In fact, Bario had no contacts whatsoever with the hotel.

On April 25 Bario, who had gone to France on a genuine narcotics investigation, called Klein from Paris. Klein arranged a meeting at his office for April 27, at which time he said he would have some news. Bario then flew back. Early on the morning of April 27 Bario and Murano, on instructions from an Assistant United States Attorney, went to a hotel in Newark, N. J., admittedly for the sole purpose of having Klein talk in an interstate telephone call. The calls began before 8 A.M., and were repeated every ten to fifteen minutes. At around 9 A.M., someone answered, and Bario asked that Klein return the call to him in Newark. Later that morning, Klein did.

Bario met Wasserberger and Klein at the latter's office later in the day. Klein reported that he had been in touch with the Queens assistant district attorney in charge of the grand jury, and that the latter, who turned out to be defendant Archer, had suggested that Klein create a fictitious story to afford some justification for Bario's possession of the guns. The three men concocted a story whereby Bario would testify he was carrying cash as a "junket coordinator" for a Las Vegas hotel and was obliged to carry a pistol, for which he had a Nevada license; Klein and Wasserberger both assured Bario that no one would check the details. The story invented to justify possession of the second pistol was considerably more preposterous; Bario would explain that he was carrying the gun for a friend overnight so that the friend could avoid upsetting a young woman with whom he had a date. Klein then informed Bario that the grand jury hearing was scheduled for May 8. The total price was fixed at $15,000 in cash, including the $500 that Bario had already paid. Klein insisted that Bario deliver the $14,500 balance to him on May 5. Bario's plan to lie to the grand jury was disclosed to the Assistant United States Attorneys and sanctioned by them.

On May 5, Bario made an intrastate call to Wasserberger to postpone delivery of the $14,500. Wasserberger said he had been trying unsuccessfully to call Bario at the Sahara Hotel in Las Vegas in order to tell him that the grand jury appearance had been postponed from May 8 to May 9; it was agreed that the cash should be delivered on May 8. On that date, Bario delivered the money to Klein in marked bills, and Klein placed it in his safe deposit box.

After a dress rehearsal in Klein's office shortly after noon on May 9, Bario went to the grand jury room with Klein and Wasserberger. While the three were sitting in the waiting room, Klein pointed out Archer and said, "That's our man." Before the grand jury, Murano was first called to testify as to the details of the arrest. Bario then told his contrived tale, except that he did not mention the Nevada permit. Archer elicited that fabrication and led

Bario as the latter denied awareness that the Nevada permit did not entitle him to carry a gun in New York. The plan threatened to miscarry when a grand juror asked whether the existence of the Nevada pistol license had been verified, but Archer stepped into the breach by falsely asserting that it had. Before the grand jury retired, Archer made a statement minimizing Bario's offense and adding, untruthfully, that Murano had expressed some doubt whether his observation of the guns had been adequate to justify Bario's arrest. The grand jury returned no true bill. Following the successful culmination of the scheme, Government agents observed an encounter between Klein and Archer. About a month later they terminated their investigation by conducting searches, pursuant to warrants, of Archer's home and Klein's safe deposit box. On the view we take of the case, it is unnecessary to treat these events in detail.

II.

Mere recital of the facts in this case inevitably calls to mind the celebrated passage in the alternative ground of Mr. Justice Brandeis' dissent in *Olmstead v. United States*, 277 U.S. 438, 485 (1928):

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Justice Brandeis' statement is eloquent but his view, taken in full breadth, has never commanded the support of a majority of the Supreme Court. In *Olmstead* itself this portion of his dissent was joined only by Mr. Justice Holmes and Mr. Justice Stone.[3] While the first ground of the dissent, namely, that warrantless wiretapping violates the Fourth Amendment, 277 U.S. at 471-79, has since been vindicated, *Katz v. United States*, 389 U.S. 347 (1967), there has been no corresponding adoption of the second, based on the criminality of the acts of the Government agents under the laws of the State of Washington, 277 U.S. at 479-80. From *Casey v. United States*, 276 U.S. 413 (1928), decided two months before *Olmstead*, to *Russell v. United States*, ... U.S. ..... (1973), 41 L.W. 4538, decided this year, the Court has steadfastly refused to rule that governmental participation in a crime necessarily vitiates the conviction of private individuals who took part in committing the offense. In *Casey*, the Court affirmed (per Mr. Justice Holmes) a conviction in a case where federal narcotics officers induced prisoners to request their attorney to supply them with narcotics for which the prisoners paid with sums advanced by the Government. Only Justices Brandeis and Butler dissented on the grounds of the Government's conduct. Yet *Casey*, like other entrapment cases where the Government has prevailed, is distinguishable from this case in several respects. In *Casey* the jailer suspected that a federal crime was being committed by a specic individual; there, as far as appears, the instigators of the scheme had only a generalized belief that something was rotten in the Queens County District Attorney's office. Furthermore, in *Casey*, as in the more common cases where federal undercover agents have induced the sale of narcotics, the criminal activity in which the Government agents participated was the very activity for which the defendant was prosecuted. Finally, in cases of that sort, the Government agents have actually not committed a crime at all since they have had no criminal

[3] Mr. Justice Butler, who joined in the portion of the dissent relating to the Fourth Amendment, thought the "dirty business" issue was not properly before the Court, 277 U.S. at 486.

intent.[4] In this case, by contrast, the Government "authorized" Barone and Murano to engage in crimes under New York law,[5] several of them prior to the discovery of any criminal activity on the part of the defendants and quite independent of the crimes the defendants committed.

The Government relies heavily on the recent decision in *United States v. Russell, supra*, where the Court reaffirmed the "subjective" view of the entrapment defense taken by the majority in *Sorrells v. United States*, 287 U.S. 435 (1932), and repeated in *Sherman v. United States*, 365 U.S. 369 (1958). By a 5-4 vote, the Court rejected the contention that the entrapment defense should focus primarily on the propriety of police behavior in inducing the defendant to commit a crime. The Ninth Circuit in *Russell* had reversed the defendant's conviction for illegally manufacturing methamphetamine because the Government agent had supplied Russell with the essential chemical ingredient required for producing the drug. This behavior, the court wrote, constituted "an intolerable degree of governmental participation in the criminal enterprise." 459 F.2d at 673. In reversing, Mr. Justice Rehnquist wrote for the Court that at least in drug-related offenses, "infiltration of drug rings and a limited participation in their unlawful present practices" is permissible, as it is "the only practicable means of detection. ..... U.S. at ....., 41 L.W. at 4540. Moreover, the Court pointed out that in *Russell* the Government agent had violated no independent constitutional right of the defendant and, by merely providing the ingredients for the illegal process, he did not violate any federal statuate or commit any crime. Finally, in holding that entrap-

[4] There are, of course, cases where agents intend to keep some or all of the purchased narcotics and make a later sale, but the government obviously is not a party to that intent.

[5] The Government argues that no one was hurt by the state crimes committed by Bario and Murano since in fact there had been no actual violation of New York's gun law, Penal Law §265.05. The Government would distinguish this case from one where federal agents were instructed to deny a state crime that had in fact been committed. In its view the waste of the time of New York police officers, judges and grand jurors in considering a fictitious crime was more than counter-balanced by the results achieved.

ment takes place only when the government's deception "actually implants the criminal design in the mind of the defendant," the Court admonished that the defense "was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practice of which it did not approve." ..... U.S. at ....., 41 L.W. at 4541.

The defendants have attempted to distinguish *Russell* on the ground that there the Government's participation in the criminal enterprise was limited, while here it was pervasive. They point particularly to Mr. Justice Rehnquist's *caveat*, ... U.S. at ....., 41 L.W. at 4540, that the Court might "some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin v. California*, 342 U.S. 165 (1952) . . ." The Government responds that the citation of *Rochin*, where the Court, under the due process clause, set aside a state conviction because of police conduct involving "[i]llegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents," 342 U.S. at 172, shows that Mr. Justice Rehnquist was thinking of conduct *directed at the defendants* which shocked the conscience of the Court even though it did not come within any "specific" of the Bill of Rights. No such "direct and immediate infringement of the rights of a defendant" occurred here, the Government insists.

We are not sure how we would decide this question if decision were required. Our intuition inclines us to the belief that this case would call for application of Mr. Justice Brandeis' observation in *Olmstead*. Even though that view has not been incorporated in the entrapment defense, there is certainly a limit to allowing governmental involvement in crime.[6] It would be unthinkable, for example, to

[6] While some passages in *Russell* strongly suggest that courts should abstain from overturning convictions because of law enforcement tactics that do not appeal to them, see ..... U.S. at ....., 41 L.W. at 4541, the Court made it clear that the entrapment defense would not

permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Governmental "investigation" involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction. Prosecutors and their agents naturally tend to assign great weight to the societal interest in apprehending and convicting criminals; the danger is that they will assign too little to the rights of citizens to be free from government-induced criminality.

In this case the Government argues, its conduct did not infringe the right either of the defendants or of any third parties; see fn. 5. Yet the Government agents displayed an arrogant disregard for the sanctity of the state judicial and police processes. The investigators apparently permitted their deserved contempt for corrupt practitioners in the Queens criminal justice system to spill over into disdain for all the participants in the system — including the police, the courts, and the members of the grand jury, all of whom were subjected to the Government's fabrications. While this pattern of deception may be less serious than some forms of governmental participation in crime that can be hypothesized, it is substantially more offensive than the common cases where government agents induce the sale of narcotics in order to make drug arrests.

Since we conclude reversal to be required on another ground, we leave the resolution of this difficult question

---

be the only means for a defendant to contest the propriety of police practices utilized to apprehend him. Besides the reference to *Rochin*, the Court noted that law enforcement practices would remain subject to "constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations." *Id.* It is doubtful, however, that the constitutional principles in this area will be any less "unmanageably subjective" than the entrapment decisions Mr. Justice Rehnquist criticized. In his concurring opinion in *Williamson v. United States*, 311 F.2d 441, 445 (5 Cir. 1962), the celebrated "contingent-fee informer" case, Judge Brown gave vent to the frustration of trying to draw lines between permissible and impermissible forms of undercover activity: "What we hold is that, recognized as is the role of informer in the enforcement of criminal laws, there comes a time when enough is more than enough — it is just too much."

for another day. We hope, however, that the lesson of this case may obviate the necessity for such a decision on our part.

III.

We take a similar view with respect to the question whether this prosecution should be dismissed because the initiation of the investigation was founded on a grossly inflated conception of the role of the federal criminal law. There is no evidence that, at the time of the February 1972 meeting, the federal law enforcement officers had any information that the supposed corruption of the Queens County District Attorney's office involved violations of the Travel Act, 18 U.S.C. § 1952;[7] the hope was rather that if the playing of the Bario-Murano scenario would induce corrupt activity, some interstate or foreign element might occur or, if not, might be injected.[8] Today there is widespread concern whether the federal criminal law has not outrun reasonable bounds; "Federal auxiliary criminal jurisdiction" has spread to the point where "[t]here is practically no offense within the purview of local law that does not become a Federal crime if some distinctive Federal involvement happens to be present." See N. Abrams, Consultant's Report on Jurisdiction, 1 Working Papers of the National Commission on Reform of Federal Criminal Laws, 33, 36 (1970). Although § 207 of the Commission's

[7] Subsequent to oral argument, the Government informed us by letter that the United States Attorney's office had "advised a high New York State Court official of the investigation, the need therefor, and the techniques to be employed in the undercover arrest of a federal agent," although conceding that not "all facets of the investigation as they later developed were communicated to the court." But it is not for an unnamed state court official to determine the proper scope of federal law enforcement.

[8] Counsel for the Government suggested at argument and repeated in the letter mentioned in fn.7 that corruption in any local prosecutor's office provides a safe harbor for organized crime, which almost inevitably crosses state lines. While this may be so, the proper course for federal officers would seem to be to aim the investigation at the organized crime. In this case the Government alleges only that it was aware of "the existence of corruption in high places," and not who was engaged in it or whether it involved any interstate activity whatsoever.

Proposed Code, entitled "Discretionary Restraints on Exercise of Concurrent Jurisdiction," includes among the cases where "a substantial federal interest exists," the instance in which "state or local law enforcement has been so corrupted as to undermine its effectiveness substantoally," it is not clear that this comprehends a case where federal investigators have no reason to suspect any violation of federal law. Even if the proposed code section was intended to cover such cases, we are not sure we would agree that the federal interest should extend that far.

While responsibility for keeping federal criminal investigations and prosecutions within the bounds appropriate on the assumptions inherent in a federal system should rest, in the first instance, with United States Attorneys under the active guidance of the Attorney General, see Friendly, Federal Jurisdiction: A General View 55-61 (1973); we are not prepared to say that, absent Congressional limitation, a federal court may never dismiss a prosecution as an abuse of federal power, see Hart & Wechsler, The Federal Courts and the Federal System 1287 (2d ed. 1973). However, we find it unnecessary to decide whether we have such a power or should exercise it here, since we hold these convictions must be reversed on another, although not unrelated, ground.

IV.

In determining whether the three interstate or foreign telephone calls in this case sufficed to trigger application of the Travel Act, it is well to have the language of the statute before us; we have reproduced the pertinent portion in the margin.[9]

---

[9] INTERSTATE AND FOREIGN TRAVEL OR TRANSPORTATION IN AID OF RACKETEERING ENTERPRISES.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

One is immediately struck by the excess of the spread of the language of the statute over the title. The title refers only to interstate and foreign travel or transportation; yet the text also includes the use of any facility in interstate or foreign commerce. The title refers only to acts "in aid of racketeering enterprises"; yet the definition of "unlawful activity" in the text displays no such limitation. The legislative history affords little indication of Congressional awareness of the enormous reach the statute could have if literally interpreted. Indeed, there is even some evidence that Congressional inadvertence contributed to the expansion in the scope of the Act as it made its way through the House and Senate committees, see fn. 10 *infra*.

The source of the statute, which was adopted with remarkable speed and little discussion, was a bill forwarded to Congress by Attorney General Kennedy on April 6, 1961. His letter of transmittal urged that:

> Because many rackets are conducted by highly organized syndicates whose influence extends over State and National borders, the Federal Government should come to the aid of local law enforcement authorities in an effort to stem such activity.

87th Cong. 1st Sess., S. Rep. No. 644 at p. 4, H.R. Rep. No. 966, reprinted in 2 U.S. Code Cong. & Adm. News 2664, 2666 (1961). He told the Senate Judiciary Committee that the Act was necessary to aid local law enforcement officials in many instances where "the 'top men' of a

---

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act) or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United State.

given criminal operation resided in one State but conducted their illegal activities in another." Hearings on S. 1653-1658, S. 1665 before the Senate Judiciary Committee on the Attorney General's Program to Crush Organized Crime and Racketeering, 87th Cong. 1st Sess. (1961) at 15-17, quoted in *Nardello v. United States*, 393 U.S. 286, 290-91 (1969). The target of the Act, he said, "clearly is organized crime." The statute would not curtail "the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise." S. Rep. No. 644, at 3. See *Rewis v. United States*, 401 U.S. 808, 811-12 n. 6 (1971). In his testimony before the House committee, the Attorney General "cited numerous instances of the use of the facilities of interstate commerce by racketeers and hoodlums to promote the illegal enterprises, to distribute the proceeds among the syndicate members of illegal gambling, liquor, narcotics, and prosticution businesses and the use of the facilities for the commission of crimes of violence in furtherance of the unlawful activities." H.R. Rep. No. 966, 2 U.S. Code Cong. & Adm. News, *supra* at 2665. Yet the bill he submitted, if read literally, would cover a $10 payment to fix a traffic ticket if only the person desiring the fix walked across a state line to pay off the policeman.

The Senate did nothing to narrow the language to the stated purpose. 107 Cong. Rec. 13942-44 (1961). The House tried to do so by amending what is now § 1952(b)(2) to read "extortion or bribery *in connection with such offenses*" (emphasis supplied), to wit, gambling, liquor, narcotics or prostitution offenses "in violation of the laws of the State in which they are committed or of the United States." H.R. Rep. No. 966, 2 U.S. Code Cong. & Adm. News, *supra* at 2667. But the Senate, responsive to an objection from the Department of Justice "that the House amendment would eliminate offenses such as 'shakedown rackets', 'shylocking' and labor extortion which were traditional sources of income for organized crime," *Nardello v. United States*, *supra*, 393 U.S. at 292, refused to agree to the change; the

House Managers yielded, 107 Cong. Rec. 18814-15 (1961), and the bill was adopted in substantially its present form.[10]

It would go beyond the proper exercise of judicial power for courts to confine the Travel Act to its title, see *Fraser v. United States*, 145 F.2d 139, 142 (6 Cir. 1944), *cert. denied*, 324 U.S. 849 (1945), or even to the precise purpose stated to Congress by the Attorney General. Nonetheless, the question remains whether the defendants here have used a facility in interstate or foreign commerce, for the purposes listed in § 1952(a)(3), in a sufficiently meaningful way to subject themselves to liability under the statute. In deciding that limited issue, we are free, indeed bound, to look to the legislative history, to consider the demands

[10] Possibly through inadvertence, the House substantially increased the scope of the Travel Act during its rush toward passage. The original bill, as submitted by the Attorney General, covered only interstate and foreign *travel*. At the urging of Senator Keating, the Senate Judiciary Committee added a section covering *transportation* in interstate and foreign cemmerce. The Senate Committee also revised the title to its current form to reflect the change, S. Rep. No. 644, at 1, 4, and the Senate passed the bill in that form. In attempting to tidy up the language of the bill, however, the House Committee expanded its scope considerably. Purporting merely to combine the two sections of the Senate bill into a single section, the House Committee substituted the present language extending the coverage of the Act to "whover *travels* in interstate commerce or *uses any facility* in interstate commerce, including the mail . . . ." The Committee demonstrated its unawareness of the significance of the altercation by reporting that the amendment made "no substantive change in the provisions of the bill" and by retaining the Senate's more restrictive title. H.R. Rep. No. 966, 2 U.S. Code Cong. & Adm. News, *supra* at 2664. The conference committe failed to catch the change; it agreed to the House's amendment because of the cosmetic value of adding a single streamlined section to title 18 rather than two cumbersome, largely repetitive ones. H.R. Rep. No. 1161, 107 Cong. Rec. 18814-15 (1961). In construing §1952, the courts have perforce read the statutory language to mean just what it seems to mean, and have uniformly applied the Travel Act to interstate telephone calls as well as interstate travel and transportation. See, *e.g.*, *United States v. Armiento*, 445 F.2d 869 (2 Cir.), *cert. denied*, 404 U.S. 853 (1971); *Menendez v. United States*, 393 F.2d 312 (5 Cir. 1968), *cert. denied*, 393 U.S. 1029 (1969); *McIntosh v. United States*, 385 F.2d 274 (8 Cir. 1967). However, the legislative background at least indicates that Congress did not regard the use of interstate facilities for purposes other than travel or transportation as among the central targets of the Act.

of federalism, and to heed the venerable rule, reaffirmed by the Supreme Court with respect to this very statute, that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States, supra*, 401 U.S. at 812.

While the precise holding of *Rewis* was that the proprietors of a Florida gambling establishment did not violate the Travel Act merely because some of their customers came from Georgia, a course of action foreseeable and even designed, the opinion indicates that the Act is not to be stretched to the limits of its language. The Court stated, 401 U.S. at 811, that the legislative history revealed "that § 1952 was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another." The warnings that "Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships" and "could overextend limited federal police resources," 401 U.S. at 812, are not without relevance here. These observations were reiterated in *Erlenbaugh v. United States*, 409 U.S. 239, 247 n. 21 (1972).

Of our own decisions under the Travel Act, the most illuminating for present purposes is *United States v. Corallo*, 413 F.2d 1306 (2 Cir.), *cert. denied*, 396 U.S. 958 (1969). Although that case, like this one, involved corruption of a local official, the evidence there disclosed numerous telephone calls from New York to Connecticut for the very purpose of arranging the bribe and distributing the proceeds among the conspirators, 413 F.2d at 1315. On that basis Judge Medina concluded, 413 F.2d at 1325, that "the extensive references in the record to interstate telephone calls that were actually made justify the inference that the use of interstate telephone calls was not a casual and incidental occurrence but the fulfillment of an integral part of the conspiratorial consensus." In *United States v. DeSapio*, 435 F.2d 272 (2 Cir. 1970), *cert. denied*, 402 U.S. 999 (1971), the interstate acts were much less numerous, see 435 F.2d at 275-76, 278, but one of them, the meeting at Fried's horsefarm, which was reached by interstate

travel at his suggestion, was the occasion when, on the Government's proof, the entire conspiracy was hatched.[11] In *United States v. Cassino*, 467 F.2d 610, 613-14 (2 Cir. 1972), *cert. denied*, ... U.S. ..... (1973), 41 L.W. 3447, several of the conspirators engaged in weekly travel from New York to New Jersey for meetings in furtherance of the conspiracy. Finally, in our most recent encounter with the Travel Act, *United States v. Kahn*, 472 F.2d 272, 285 (2 Cir. 1973), where there was extensive interstate travel and use of the mails, Judge Smith distinguished *Rewis* and the Seventh Circuit decisions cited below on the ground that in them "the defendants themselves engaged in no interstate activities, and that the total interstate travel aspect of the enterprises was either marginal or unforeseen."

Of the other circuits the Seventh has had most to say concerning how purposeful and important to the enterprise the use of interstate facilities must be. *United States v. Altobello*, 442 F.2d 310 (7 Cir. 1971), held it was not enough that a Philadelphian who was the victim of extortion in Chicago gave as part payment the proceeds of a check he cashed on a Philadelphia bank, which cleared through the mails.[12] In *United States v. McCormick*, 442 F.2d 316, 318 (7 Cir. 1971), an Indiana lottery operator advertised in a local newspaper for salesmen, and some copies of the newspaper were mailed out of the state. The court again refused to permit application of the Travel Act, finding that "the activities engaged in by defendant

---

[11] Examination of the briefs in the *DeSapio* appeal confirms the writer's recollection that no issue concerning the applicability of the Travel Act was raised. This was also true in *United States v. Pordum*, 451 F.2d 1015 (2 Cir. 1971), *cert. denied*, 405 U.S. 998 (1972).

[12] The Fourth Circuit cases seem contra on this point. *United States v. Salsbury*, 430 F.2d 1045 (4 Cir. 1970), held that cashing out-of-state checks, with knowledge that they would be cleared through the mails was sufficient to invoke the statute. This followed the earlier decision in *United States v. Wechsler*, 392 F.2d 344 (4 Cir.), *cert denied*, 392 U.S. 932 (1968) ("When one deposits a check, there would seem to be little doubt that he is using a facility in interstate commerce." *Id.* at 347 n.3.).

were essentially local" and that the role played by the interstate mailings was "a matter of happenstance" and "minimal and incidental" to the operation of the illegal lottery. The decision in *United States v. Lee*, 448 F.2d 604, 607 (7 Cir. 1971), cited by the Government, indicates no contrary view; in that case employees of an Indiana gambling establishment regularly crossed state lines, and the court distinguished both *Altobello* and *Rewis* by pointing to the "continual interstate travel by employees of the illegal venture." Two cases from other circuits holding the interstate aspect insufficient are *United States v. Hawthorne*, 356 F.2d 740 (4 Cir.), *cert. denied*, 384 U.S. 908 (1966) [moving self and family from Indiana to West Virginia where illegal gambling enterprise was to be undertaken]; and *United States v. Judkins*, 428 F.2d 333 (6 Cir. 1970) [calls from Arkansas to appellant's house of prostitution in Tennessee not shown to have a business purpose].

It is with this background that we consider the three telephone calls which the Government claims to have brought this case within 18 U.S.C. § 1952(a)(3).

We begin by discarding Klein's return of Bario's calls from Newark on the morning of April 27. Whatever Congress may have meant by § 1952(a)(3), it certainly did not intend to include a telephone call manufactured by the Government for the precise purpose of transforming a local bribery offense into a federal crime. In view of the totally fabricated nature of this episode, it is immaterial that Klein returned the call rather than receiving it as the Government had plotted. The Government's reliance on *United States v. Edwards*, 366 F.2d 853, 867-68 (2 Cir. 1966), *cert. denied*, 386 U.S. 908 (1967), is misplaced. There this court found that the participants "never considered themselves limited by New York boundaries" and indeed had suggested that the stolen securities be disposed of outside New York; moreover, the issue of the manufacture of federal jurisdiction had not been raised at trial. It is not a sufficient answer that if the issue here were simply one of entrapment, the jury would have been justified in finding, under the entirely correct instruction on the sub-

ject given by the judge, that Klein had a propensity for crime, requiring no encouragement from the federal agents. Our holding is rather that when Congress responded to the Attorney General's request to lend the aid of federal law enforcement to local officials in the prosecution of certain crimes, primarily of local concern, where the participants were engaging in interstate activity, it did not mean to include cases where the federal officers themselves supplied the interstate element and acted to ensure that an interstate element would be present. Manufactured federal jurisdiction is even more offensive in criminal than in civil proceedings, cf. 28 U.S.C. § 1359. As the late Judge Freedman said with respect to civil actions in *McSparran v. Weist*, 402 F.2d 867, 873 (3 Cir. 1968) (*en banc*), *cert. denied*, 395 U.S. 903 (1969), manufactured jurisdiction "is a reflection on the federal judicial system and brings it into disrepute."

Similar considerations lead us to reject the Government's reliance on Wasserberger's unsuccessful attempts to reach Bario in Las Vegas. Those calls also resulted from a plant by the Government — in this instance a plant of misinformation which provoked interstate telephone calls that Wasserberger would not otherwise have made.[13] An additional ground for ruling out the abortive Las Vegas calls is that there was not and, under the circumstances, could not have been any actual use of a facility in interstate commerce which would in fact promote, etc., any unlawful activity. When Bario told Wasserberger that he could be reached at the Sahara Hotel, he knew that any attempt to

[13] The Government contends that Bario gave Wasserberger the Sahara Hotel information "only after great pressure by Wasserberger and Klein to furnish a number." According to Bario's testimony, however, when Klein requested a number to call, Bario said that Wasserberger would know how to get in touch with him, and when Wasserberger asked for a number, Bario readily spun out the tale about leaving messages at the Sahara Hotel. Since the Government's assertion that the hotel story was invented "solely to maintain the credibility of Agent Bario as a Las Vegas mobster" is nowhere supported in the record, we need not decide whether the considerations mentioned in this footnote would lead to a different result if factually sustained.

reach him at the hotel would be frustrated. We refuse to construe the "intent" language of § 1952 so broadly as to include a call to an innocent telephone operator who had not the faintest idea of what was afoot.[14]

We are thus left only with Bario's call from Paris on April 25. That call was not planted in the sense that the Newark call was; the Government did not send Bario abroad for the sole purpose of making a foreign call. But, apart from the question, which we leave unresolved, whether a communication with an undercover agent can ever meet the requirement of § 1952(a), the Paris call rather precisely fits Judge Medina's characterization in *United States v. Corallo*, *supra*, 413 F.2d at 1325, of "a casual and incidental occurrence" and Mr. Justice Marshall's reference in *Rewis*, *supra*, 401 U.S. at 812, to "a matter of happenstance." The call served no purpose that would not have been equally served by a call from New York; the most that can be said is that when the defendants made their despicable agreement with Bario, they were told he might be calling from across the Atlantic rather than the East River — a matter of complete indifference to them. Beyond all this is the question whether the *receipt* of an interstate or foreign telephone call, in no way initiated by a defendant, even though expected by him, is any more a violation of the Travel Act than the reception of Georgia gamblers by the Florida operators in *Rewis*, *supra*, 401 U.S. 808. In light of the principles controlling our decision, which we summarized at the conclusion of our discussion of the legislative history of the Travel Act, we hold that the Paris call was insufficient to transform this sordid, federally provoked incident of local corruption into a crime against the United States.

The convictions are reversed for insufficiency of the evidence to show a violation of, or a conspiracy to violate, the Travel Act, with instructions to dismiss the indictment.

---

[14] We do not mean the foregoing to be taken as indicating that we would reach a different conclusion with reference to the Las Vegas calls if the operator had passed them on to Bario; we simply need not decide that issue.

SUPREME COURT, U. S.
FILED
OCT 26 1973

No. 73-116

In the Supreme Court of the United States

OCTOBER TERM, 1973

RALPH D. ROCKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

HENRY E. PETERSEN,
Assistant Attorney General,

JEROME M. FEIT,
HARVEY M. STONE,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	9
Conclusion	19

CITATIONS

Cases:

Blondes v. *Maryland*, 16 Md. App. 165	14
McIntosh v. *United States*, 385 F. 2d 274	11
Rewis v. *United States*, 401 U.S. 808	15, 16, 17
United States v. *Altobella*, 442 F. 2d 310	17
United States v. *Archer*, C.A. 2, No. 73-1527, decided July 12, 1973	16
United States v. *Baggett*, 481 F. 2d 114, pending on petition for writ of certiorari, No. 73-348	3, 13
United States v. *Brewster*, 408 U.S. 501	14
United States v. *Nardello*, 393 U.S. 286	11
United States v. *Rizzo*, 418 F. 2d 71	11

Statutes:

Travel Act, 18 U.S.C. 1952	2, 10, 11, 14
Ann. Code of Md., Article 27, § 23	11
Maryland Uniform Certification of Questions of Law Act, Ann. Code of Md., Article 26, §§ 159-170	10

Miscellaneous:

Zoning Ordinance for the Maryland-Washington Regional District in Prince George's County, Maryland, as amended through December, 1964, §§ 30.21, 30.41 (1965) 3

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-116

RALPH D. ROCKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 481 F. 2d 112. The opinion of the district court (Pet. App. B) is reported at 339 F. Supp. 249.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1973. The petition for a writ of certiorari

was filed on July 13, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals erred in declining to certify certain allegedly unresolved issues of Maryland law to the highest court of that State.

2. Whether petitioner's criminal enterprise involved sufficient interstate activity to violate the Travel Act, 18 U.S.C. 1952.

3. Whether petitioner's right to cross-examination was violated because the trial judge, during a post-trial evidentiary hearing, undertook to question the jurors himself as to whether an allegedly prejudicial newspaper article had come to the attention of any of them during their deliberations.

4. Whether the evidence was sufficient to support the district court's finding that the newspaper article in question had not been read by any of the jurors prior to the verdict.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of using interstate facilities with intent to promote bribery, in violation of 18 U.S.C. 1952. He was sentenced to imprisonment for a term of fifteen months and ordered to pay a $10,000 fine and court costs. The court of appeals affirmed (Pet. App. A).

The evidence showed that petitioner, a well-to-do builder and real estate entrepreneur, had developed various areas of land in Virginia and Maryland (Tr. 67). He owned several corporations, the most important of which were Rocks Engineering Company, Inc. and Allen and Rocks, Inc., both having offices in the District of Columbia. Between 1962 and 1968 petitioner filed numerous zoning applications in Prince George's County, Maryland. Typically, he would seek rezoning of his property to a higher density and then develop the land or resell it at a substantial profit. These zoning applications were ultimately ruled upon by the Prince George's Board of County Commissioners, which had final authority over all zoning matters.[1]

In early December 1964, petitioner's co-defendant, James S. Baggett,[2] became the Chairman of the Board of County Commissioners (the "Board") (Tr. 470). Baggett had first joined the Board in 1954 (Tr. 471) and by December 1964 was an influential member of a majority block of Commissioners (Tr. 472, 936-939, 950-951, 1054-1057, 1149, 1158-1159, 1216-1217, 2007-2008, 2015-2017). The government adduced evi-

---

[1] Zoning Ordinance for the Maryland-Washington Regional District in Prince George's County, Maryland, as amended through December 1964, §§ 30.21, 30.41 (1965).

[2] After a severance, Baggett was tried (before petitioner) in the United States District for the District of Maryland. He was convicted, the court of appeals affirmed, 481 F.2d 114, and he has sought review by this Court, No. 73-348. Petitioner's case was transferred to the Eastern District of Virginia because of the publicity generated by Baggett's trial.

dence to show that, pursuant to a long-term corrupt agreement, petitioner gave a series of gifts to Baggett in return for expeditious approval of zoning applications, and that other participants in this scheme were William Kahler, petitioner's attorney and a partner in most of his real estate ventures (Tr. 455, 524, 525, 699, 740, 804; G. Ex. 266), and William Stevens, appointed in 1963, through Baggett's recommendation, as Chairman of the Maryland National Park and Planning Commission, the body with whom zoning applications were first filed and which made recommendations to the Board prior to final rulings (Tr. 835-838, 841-846, 1122-1130).

In early December 1964, Baggett asked an acquaintance named Louis Fiedler for advice on a new tractor which he said a "friend" of his wanted to purchase. Fiedler suggested a John Deere agricultural tractor, which he reported could be bought for $3,500 at the Ungar Equipment Company in Maryland (Tr. 109-110, 167). On December 20, 1964, Baggett went with Fiedler to inspect the tractor. On December 23, 1964, just three weeks after Baggett had become Chairman of the Board, petitioner wrote out a Rocks Engineering Company check payable to the Ungar Equipment Company in the amount of $3,500. Although the government was unable to document the precise means by which the interstate movement of this check (the subject of the indictment) was accomplished, the evidence was clear that the check was delivered to Baggett across interstate lines. Thus, at the time petitioner signed the check he was

in one of his offices in the District of Columbia; three days later, on December 26, Baggett appeared at the Ungar Equipment Company in Harwood, Maryland, and used the check to purchase the tractor that Fiedler had recommended. Baggett asked that the tractor be invoiced to Rocks Engineering Company but instructed that it be delivered to his own farm in Calvert County, Maryland (Tr. 110-113, 169-172). The tractor was delivered to Baggett's farm in early January 1965, and remained there until May 1968,[3] when Baggett returned it to petitioner after learning

[3] A married couple working as tenant farmers testified that the tractor never left the farm between its delivery in January 1965 and the date of their departure in April 1965 (Tr. 2810-2830, 2853-2857); a college student, who lived on the farm for three summers (1965-1968) and on frequent weekend visits during the school year used the tractor to plow snow, testified that, except for one occasion when the tractor had to be repaired, he could recall no time when it was absent (Tr. 1226-1231, 1234, 1237, 1247, 1252-1253, 1257, 1261); a sales manager at the Ungar Equipment Company produced business records showing that the tractor had been repaired for Baggett in July 1967 (Tr. 186-189, 247-248; cf. Tr. 141, 153, 183-186). At least six other government witnesses provided testimony placing the tractor on Baggett's farm between January 1965 and May 1968 (Tr. 113, 115, 150, 247-248, 253-255, 2915, 2917, 2944-2945; cf. Tr. 118-120, 190-195, 1236-1237, 1268-1270).

Several witnesses for the defense, all petitioner's employees, expressed belief that the tractor in question was on petitioner's construction sites for substantial periods of time between 1965 and 1968. Although arguing in the court of appeals that the tractor was "apparently" used by both petitioner and Baggett during these years (Appellant's Motion to Certify Unresolved Questions of Maryland Law, p. 8), the defense did not attempt to explain how or why the tractor might have been sent back and forth between Baggett's farm and petitioner's projects.

that the Internal Revenue Service had discovered the transaction (Tr. 1263-1265, 1280-1294, 2916).[4]

Between 1963 and 1967 petitioner, at his own expense, took Baggett, Stevens, and Kahler on two vacations to Florida and another to Florida and the Bahamas (Tr. 407, 612-621, 644-645, 877-878, 882-890). On three other occasions Kahler paid for the expenses of Baggett and Stevens when he went with them to Miami Beach (Tr. 557, 585-589, 857-859, 872-881).[5] Significantly, though Stevens knew petitioner and Kahler before becoming Chairman of the Park and Planning Commission, he was not invited to join them on vacations until he assumed that office, and he received no further invitations after his term expired in June 1966 (Tr. 573, 644-645, 676, 816, 819-820, 895). Stevens admitted that no other zoning applicants or their attorneys treated him to vaca-

---

[4] Evidently trying to make the purchase of the tractor appear to be a normal business acquisition, petitioner depreciated the tractor on the federal income tax return of his engineering company between 1964 and 1968 (Tr. 1299-1300). The invoice for the tractor was never placed in the regular construction equipment files of the company, which was unable to produce documentation of the transaction when requested to do so by the Internal Revenue Service (Tr. 290-293, 328, 345-346, 387).

[5] Whether petitioner and Kahler paid for all of these trips was disputed at trial. The government produced business records proving that they paid for three trips. Although Kahler testified that he could not remember who financed the other trips (Tr. 556-557, 586, 630-631), there was substantial non-documentary evidence that he and petitioner had paid all expenses (Tr. 407, 858-862, 874-875, 890, 905-907, 1007-1008, 1863-1868, 1884-1888).

tions during his tenure and that Baggett was the only County Commissioner with whom he had ever vacationed (Tr. 917-918). Moreover, while petitioner took frequent trips to Florida with social and business friends, he never invited his three zoning associates to join him on those occasions, but rather kept the two traveling groups separate and distinct (Tr. 1863-1866, 1884-1888).

Petitioner and Kahler provided various other benefits to Baggett and Stevens. On November 18, 1964, about a month before the purchase of the tractor, Kahler gave Baggett $1,000 (Tr. 591-608). Though Kahler called this transfer a loan, there was no evidence of indebtedness, and the money was repaid only after the Internal Revenue Service inquired about the transaction (Tr. 591-608). Kahler also loaned Stevens $500 in 1963 (Tr. 954).[6] In early 1965 petitioner and Kahler met with James Casey, a prominent county politician, and offered to raise $170,000 for the gubernatorial candidate whom Casey was supporting in the upcoming 1966 elections; in exchange, they wanted to name three of the five candidates for County Commissioner who would run on Casey's slate (Tr. 1135-1152). It was understood that one of the candidates would be Baggett, with whom Casey discussed the matter (Tr. 1145). Finally, in the fall of 1965, petitioner gave Baggett new furniture and carpeting worth about $5,600 (G. Ex. 304, 316).[7]

---

[6] Kahler denied that petitioner knew of these two transactions (Tr. 777).

[7] These furnishings had been acquired by petitioner for use in a model apartment in one of his projects (Tr. 1486-1572). By prearrangement, Baggett moved into the apartment in De-

The government produced evidence to show that these various benefits were given and received with the intent that Baggett and Stevens would expedite the approval of petitioner's zoning applications. At the time of Stevens' appointment to the Park and Planning Commission, he was instructed by Baggett, who had discussed the need for speedier processing with Kahler, to try to shorten the lengthy delays which generally caused expense and inconvenience to real-estate developers (Tr. 466, 837-838, 1045-1047, 2288-2290; cf. Tr. 550, 841-842). On about ten occasions during the next three years, Baggett advised Stevens to expedite petitioner's zoning applications through the Park and Planning Commission (Tr. 922-924). Stevens successfully executed many of these requests (Tr. 920, 928-929).

Between 1962 and 1968 a steady stream of petitioner's zoning applications came before Baggett and his colleagues for final decision. The record reveals only one instance during that period in which

---

cember 1965, shortly before petitioner sold the apartment complex. At the time Baggett moved in, the furnishings were in excellent condition and nothing had been removed (Tr. 1489, 1494-1496, 1508-1510, 1519-1520, 1522, 1531, 1562-1570).

One of petitioner's employees testified that a few pieces of identical furniture were located in petitioner's beach house in January 1972 (Tr. 2575-2590), but the defense did not establish whether this furniture had come from Baggett's apartment or from another model apartment furnished by the same decorator at one of petitioner's other projects (Tr. 1454).

Baggett voted against an application by petitioner.[8] Eight of petitioner's applications were pending on December 23, 1964, when petitioner signed the $3,500 check to purchase Baggett's tractor. During the preceding week the Maryland National Park and Planning Commission had recommended to the Board that two of these applications be denied (G. Ex. 266 A) and had given another application an unfavorable report (G. Ex. 266 B). Nevertheless, these three applications were all approved by the Board within three months after the purchase of the tractor; the deciding vote on one of these applications was cast by Baggett (G. Ex. 266 B). On another occasion, in May 1966, Baggett ordered that the Board of County Commissioners consider three of petitioner's zoning applications, the hearings to be held the day after a newly proposed zoning classification desirable to petitioner would first be available (D. Ex. 120-C).

ARGUMENT

1. Petitioner contends (Pet. 22-27) that the court of appeals should have certified unresolved issues of

---

[8] In 1963, over a year before he received the tractor, Baggett voted against petitioner's application for high-rise zoning on property in Hyattsville. This application was strongly opposed by community organizations in the area and had been unanimously condemned by the Hyattsville city council. In December 1968 Baggett voted against several of petitioner's applications, but this reversal in policy occurred about three months after petitioner learned that the purchase of the tractor was the subject of a criminal investigation by the Internal Revenue Service (Tr. 2977).

Maryland bribery law to the highest court of that state, pursuant to the Maryland Uniform Certification of Questions of Law Act,[9] which authorizes the Maryland Court of Appeals, upon request from a federal appellate court, to decide questions of state law which may be determinative of a federal case and as to which there appears to be no clear precedent in state court decisions. Petitioner's argument is apparently that a violation of state law is a prerequisite to a conviction under the Travel Act, 18 U.S.C. 1952,[10] and that (according to his interpretation of Maryland bribery law) the government failed to prove certain elements of the state offense—including the requirements that there be an actual bribery agreement and that the bribe be given in exchange for a specific act. The court of appeals properly determined that certification was unnecessary.

Under the Travel Act, once sufficient interstate activity is shown, the government need not prove that the underlying state offense was consummated, but merely that the defendant acted "with intent to * * *

---

[9] The certification statute, Ann. Code of Md., Art. 26, §§ 159-170 (1972), went into effect while petitioner's case was pending in the court of appeals.

[10] The Travel Act, 18 U.S.C. 1952, applies, in pertinent part, to "[w]hoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to * * * promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity," defined to include "bribery * * * in violation of the laws of the State in which committed * * *."

facilitate the promotion" of the state offense.[11] See *United States* v. *Rizzo*, 418 F. 2d 71, 74, 79-80 (C.A. 7); *McIntosh* v. *United States*, 385 F. 2d 274, 276-278 (C.A. 8). As the district court instructed the jury on this matter—without objection by petitioner on grounds of his alleged state law defenses—the evidence for conviction is sufficient if it is found that petitioner intended to influence Baggett in the performance of his official duties with respect to petitioner's zoning applications then or thereafter pending. This instruction comports with the requirements for conviction under not only the Travel Act, but also the Maryland bribery statute, which is applicable to anyone who "shall bribe or attempt to bribe any * * * officer * * * of any county * * * in order to influence * * * such officer * * * in the performance of any of his official duties * * *." Ann. Code of Md., Art. 27, § 23.

---

[11] Petitioner makes the misleading assertion that the government maintained in the court of appeals that "it was unnecessary to prove that the enterprise, in aid of which the interstate facility was allegedly utilized, was unlawful under state law" (Pet. 26). However, the government argued in the court below that the Travel Act requires proof only of an act committed "with intent to * * * facilitate the promotion" of bribery under state law. Petitioner's authorities do not undermine this position. *United States* v. *Nardello*, 393 U.S. 286, on which petitioner relies (Pet. 26), held that 18 U.S.C. 1952, in prohibiting interstate travel with intent to carry on extortion in violation of state law, applies not merely to those acts actually denominated "extortion" by state statute but also to the state offense of "blackmail," which falls within the generic definition of extortion under the federal act. Nothing in *Nardello* suggests that the state crime must be consummated before federal jurisdiction may be invoked.

In any event the government did prove, consonant with petitioner's interpretation of the relevant law, that there was an actual bribery agreement relating to a specific act or acts. There was overwhelming evidence showing petitioner's motive for bribing Baggett and documenting the series of financial benefits he bestowed upon Baggett over the years. The record also strongly suggests Baggett's corrupt intent—by his acceptance of gifts from petitioner and Kahler, his votes in favor of petitioner's zoning applications, his special efforts to expedite those applications, and his instructions to Stevens to help in this process through his position at the Park and Planning Commission. Viewed in light of all the evidence, certain series of events seem especially suspect, such as the purchase of the tractor one week after certain of petitioner's applications received unfavorable recommendations by the Park and Planning Commission, and the approval of those applications by the Board only two months later.

Contrary to petitioner's assertions (Pet. 6, 23, 25), the government never "acknowledged" (Pet. 23) in the trial court that it would not prove a bribery agreement, express or implied, nor was it "conceded" (Pet. 23) that the bribe was not for specific acts. Neither, as petitioner suggests (Pet. 23), did the government state that this case involved a "novel" theory of bribery law. Rather, the record (including those parts on which petitioner relies) clearly shows that the government's position in the district court was that this case involved "a continuing relationship of

continual bribery" (Transcript of Hearing of May 7, 1970, at 82-84, 92), and that gifts such as the tractor were not payment for any single specific action, but part of a "general understanding that Baggett would help * * * [petitioner], wherever possible, as to whatever [petitioner] * * * had pending before Baggett * * *" (*id.* at 84; see *id.* at 53, 62-70, 82-84, 88, 92; Transcript of Hearing of June 4, 1970, at 26-28, 40). The official acts that Baggett was to perform pursuant to this agreement were not any less specific by virtue of the fact that they were legion.[12]

Petitioner also seems to allege (Pet. 25) a state law requirement of proof that the donor intend to receive a benefit in return which was otherwise unobtainable. He emphasizes (Pet. 25, n. 9) the government's failure to try to show that the technical merits

---

[12] Petitioner states (Pet. 25) that the court of appeals rejected the argument that the bribe was for designated specific acts. Since the court, in affirming the conviction, felt it unnecessary to discuss this issue, the more likely inference is that the argument was accepted. In support of his point, petitioner extracts the statement from the court's opinion in *Baggett* that "[t]he Government's evidence did not show a specific *quid pro quo* from Baggett to Rocks in return for the $3,500 check." *United States* v. *Baggett, supra,* 481 F.2d at 115. This statement is perfectly consonant with the government's theory of petitioner's case as involving a "continuing relationship of continual bribery." As the court in *Baggett* went on to explain, the evidence showed "Baggett's corruption by the unprincipled greed of a wealthy man and Baggett's preference for favors and gifts over his public duty. The jury was clearly authorized to draw the inference and conclusion that the $3,500 check represented a payment by Rocks to Baggett for continuing favorable zoning rulings" (*ibid.*).

of petitioner's applications did not justify approval by the Board. It is quite apparent, however, that petitioner received special benefits as a result of Baggett's assistance. On several occasions Baggett himself took steps to speed petitioner's applications through the administrative process. Moreover, as petitioner's zoning expert testified (Tr. 2280-2282), zoning decisions involve political and subjective considerations as well as analyses of the technical merits. In any event, Maryland bribery law does not require that petitioner's applications would have been denied but for Baggett's influence on the Board. See *Blondes* v. *Maryland*, 16 Md. App. 165; cf. *United States* v. *Brewster*, 408 U.S. 501, 526.

In short, there was no basis for imposing a requirement that the court of appeals certify any state law issues which might reasonably have been considered dispositive of this case.

2. Petitioner contends (Pet. 17-22) that the court of appeals' decision, in holding that the interstate activity involved here was sufficient to warrant a conviction under the Travel Act, was incorrect because "[o]ther than the writing of the check [for the purchase of the tractor] in the District of Columbia, a mere happenstance, this case has no connection with any jurisdiction other than Maryland" (Pet. 21). As detailed in the statement, however, the record reveals that the corrupt relationship between petitioner and his associates was characterized by frequent and substantial interstate travel intended to facilitate the promotion of bribery. Although the

government was unable to document the precise means by which the interstate movement of petitioner's check for Baggett's tractor was accomplished, the evidence sufficiently established that either petitioner or an accomplice transported the check (or arranged for its transportation) from the District of Columbia to Harwood, Maryland. In an apparent attempt to continue the promotion of this bribery scheme, petitioner and his partner Kahler took Baggett and Stevens on at least six trips to Florida and the Bahamas between 1963 and 1967. In addition, part of the furniture which petitioner gave to Baggett in 1965 was paid for with a check that moved in interstate commerce (G. Ex. 317). We also note that petitioner's business, which he sought to promote with Baggett's help, encompassed multi-state operations. Although petitioner resided in Maryland, he had substantial real estate ventures in Virginia (Tr. 67, 1898-1899), and even his Maryland operations were directed from out of state. Between 1962 and 1967, petitioner's offices were located in the District of Columbia (in the Bender Building, where he signed the check for the tractor); his offices were thereafter moved to Alexandria, Virginia (Tr. 265).

Petitioner's reliance on *Rewis* v. *United States*, 401 U.S. 808, is misplaced. In *Rewis* this Court held that the proprietors of a lottery operation in Florida did not violate the Travel Act merely because, as they could have foreseen, some of their customers crossed the nearby Florida-Georgia border. Nor did the record in *Rewis* justify a conclusion that

the encouragement of interstate patronage was equivalent to the conduct of a principal in a criminal agency relationship; as the court observed, "we are not informed of any action by petitioners, other than actually conducting their lottery, that was designed to attract out-of-state customers." 401 U.S. at 814. Here, by contrast, the principals themselves (and perhaps their agents as well) were directly involved in a substantial course of interstate movement designed to further the illegal scheme. See *id.* at 813.

In *United States* v. *Archer*, C.A. 2, No. 73-1527, decided July 12, 1973, cited in petitioner's Supplemental Brief in Support of Petition, the government's undercover agents penetrated corrupt local activities and actually caused the bribery of a state assistant district attorney. The only interstate element was a "casual and incidental" occurrence (Supp. Pet. App. 21a)—the receipt by the defendant of a single telephone call, made by a government agent and expected but not initiated by the defendant. The court held that the "call was insufficient to transform this sordid federally provoked incident of local corruption into a crime against the United States"—a determination which made it unnecessary to consider the question "whether a communication with an undercover agent can ever meet the requirement of § 1952(a)." [13]

---

[13] In reviewing the degree of interstate activity disclosed by the record, the court in *Archer* discarded other telephone calls "manufactured by the Government for the precise purpose of transforming a local bribery offense into a federal crime" (Supp. Pet. App. 19a-21a).

Nor does the instant decision conflict with *United States* v. *Altobella*, 442 F. 2d 310 (C.A. 7). In that case, no basis for federal jurisdiction was found when a Philadelphian, victimized by extortion in Chicago, chose to give the defendants cash he obtained by cashing a check drawn on a Philadelphia bank, which later cleared through the mails. The interstate use of the mails was not initiated by or even known to the defendants, was incidental to the extortion scheme, and was essentially "a matter of happenstance." *Rewis* v. *United States*, *supra*, 401 U.S. at 812. Whatever may be said about inconsistencies between *Altobella* and other decisions of the Fourth Circuit, there is no conflict with the instant case, which involved frequent interstate travel by the principals as well as *their* transportation of a check across state lines, possibly but not necessarily through use of the mails.

3. Petitioner also contends (Pet. 12-17) that some of the jurors read an allegedly prejudicial newspaper article during their deliberations and that he was denied his right to confront witnesses when, during a post-verdict hearing to determine if the article had come to the jury's attention, the district judge refused to let defense counsel cross-examine the jurors but rather undertook to question them himself. These contentions are fully answered in an opinion by the district court (Pet. App. 3a-17a), which the court of appeals incorporated into its opinion (Pet. App. 2a), and upon which we rely here. The evidence recited in the trial court's opinion was clearly sufficient to warrant its finding that none of the jurors

had read the article or been told of its content until after their verdict. Indeed, as the district court observed (Pet. App. 13a, n. 7), "[t]he disparity between the actual facts and the allegations of the motion which impelled this Court to order a post-trial hearing suggests the desirability of a rule such as that mentioned in *Miller* v. *United States* [403 F. 2d 77 (C.A. 2)], which would prohibit questioning of a juror by an attorney after a verdict except by leave of court." Nor did the district court abuse its discretion as to the manner in which the hearing was conducted. Counsel were given an opportunity to submit appropriate questions both before and after questioning of the jurors by the court. The court itself conducted the examination in order to prevent improper questioning beyond the limited scope of the inquiry. As the court found (Pet. App. 14a), the fact "[t]hat defense counsel wished to inquire into impermissible subjects in questioning the juror witnesses quite clearly appears from the questions that he submitted in advance of the hearing." In light of these circumstances the court correctly found, after proper inquiry, that petitioner's Sixth Amendment rights were not violated by any extraneous influence on the jury.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

JEROME M. FEIT,
HARVEY M. STONE,
Attorneys.

OCTOBER 1973.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1973 524672 112

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
NOV 2 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-116

RALPH D. ROCKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF BY PETITIONER

ARNOLD M. WEINER,
Ten Light Street,
Baltimore, Maryland 21202,

A. KENNETH PYE,
2802 Chelsea Circle,
Durham, North Carolina.

The Daily Record Co., Baltimore, Md. 21203

Table of Contents

	PAGE
Reply Brief	1

Table of Authorities

Cases

McIntosh v. United States, 385 F.2d 274 (8th Cir., 1967)	3
Turf Center, Inc. v. United States, 325 F.2d 793 (9th Cir., 1964)	3
United States v. Altobella, 442 F.2d 310 (7th Cir., 1971)	2
United States v. Archer, ... F.2d ... (2d Cir., 1973)	2
United States v. D'Amato, 436 F.2d 52 (3rd Cir., 1970)	3
United States v. Nardello, 393 U.S. 286	3
United States v. Salsbury, 430 F.2d 1045 (4th Cir., 1970)	2
United States v. Stagman, 446 F.2d 489 (6th Cir., 1971)	3

Statutes

Travel Act, 18 U.S.C. §1952	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-116

RALPH D. ROCKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF BY PETITIONER

1. The Government's Brief in Opposition attempts to mask the serious weaknesses in its position with respect to the procedure for conducting hearings on juror misconduct which was approved by the courts below. The Government reverses, curiously, the order of the questions presented, framing its own with respect to the hearing procedure and addressing itself to those questions only in a cursory argument toward the end of its Brief. In this manner the Government seeks to justify the rule that when a substantiated allegation of jury misconduct is made, a court may deny counsel the right to examine the jurors personally, ask only such questions as it desires, and then find that the evidence

does not sustain the allegation on the basis of the fragmentary record adduced from its limited questioning.

To accept the Government's contention, and to permit the opinions below to remain undisturbed, is to ring the death knell on the highly desirable conduct, exemplified by the Petitioner's defense counsel, of reporting possible juror misconduct to the court promptly after its discovery. In 44 states (including Virginia) and the District of Columbia, counsel may by law interrogate jurors *ex parte* and report the matter to the court only upon the conclusion of the inquiries. This approach is far less protective to jurors than recourse to the Court followed by court-supervised examination of jurors by counsel. Nevertheless, many counsel will feel required to engage in *ex parte* interviews if the alternative is the kind of hearing sanctioned by the court below which precludes the type of inquiry required to establish misconduct. Both the equities of the case at bar and sound policy for the future, therefore, require that this Court strike down the procedure adopted by the lower courts in this case.

2. The Government cannot escape the conflict between the holdings of the Fourth Circuit, as represented by the instant case and *United States v. Salsbury*, 430 F.2d 1045 (1970), and those of the Seventh and Second Circuits in *United States v. Altobella*, 442 F.2d 310 (1971), and *United States v. Archer*, ... F.2d ..... (1973). *Altobella* and *Archer* both recognize, expressly, the existence of the genuine disagreement as to the reach of the Travel Act. It does no good, moreover, to attempt to inflate the interstate aspects of the case, as the Government also tried unsuccessfully in *Archer*, by alluding to non-criminal transactions which might have crossed state lines. The present case involves a single charge, the transportation in December, 1964, of a check from the District of Columbia to a Maryland suburb. The Government's effort to bolster its position here, by referring

to several trips to Florida and the Bahamas, is wholly inappropriate, for the Government itself had conceded in the district court that these trips did not constitute bribes, that they were not charged as such and that they amounted to no more than permissible business entertainment (Tr. 1860; 3261-65). The Government's own witnesses, furthermore, testified that the trips were wholly unrelated to Petitioner's zoning applications (Tr. 676, 679, 858, 873, 879, 880, 886, 910-15).[1] The Government seeks to justify its position in this Court, therefore, upon an entirely different basis from that on which the conviction was obtained.

3. The Government's primary contention, in answer to our argument that unresolved questions of Maryland bribery law should have been certified to the highest court of that state, is that we overstate the role of state law in the offense proscribed by the Travel Act. As one of its principal authorities for minimizing the importance of state law, the Government has cited *McIntosh v. United States*, 385 F.2d 274 (8th Cir., 1967). Overlooked, however, are the statements of Judge Matthes for the court there, that "Indeed, the indictment would probably be subject to attack if it failed to allege the state crime the accused had intended to violate by means of an interstate facility", and that "the 'unlawful activity' . . . must be one defined and proscribed by state law . . ." (385 F.2d 274, 276, 277). These statements make clear the rule that there can be no conviction under

[1] Similarly, the Government can derive no benefit from its statement that certain furniture, which the Petitioner had given to Mr. Baggett as a Christmas gift in December, 1965, has been purchased by way of a check which had also travelled between the District of Columbia and a Maryland suburb (Brief in Opposition, p. 15). The statement cleverly avoids reference to the fact that the furniture had been purchased months earlier, for use in a model apartment in Maryland, and that, only after the model was closed, was the furniture moved from one point in Maryland to another (GX 317; Tr. 1312-13; 1456; 1472-81; 1584-90; 2575-89).

the Travel Act unless the use of interstate facilities is shown to have been in aid of a pre-existing violation of state law or, at the very least, as a step toward an objective which, if accomplished, would have amounted to a violation of state law. See also, to the same effect: *United States v. Nardello*, 393 U.S. 286; *Turf Center, Inc. v. United States*, 325 F.2d 793, 796 (9th Cir., 1964); *United States v. D'Amato*, 436 F.2d 52 (3rd Cir., 1970); and *United States v. Stagman*, 446 F.2d 489, 492, 493 (6th Cir., 1971).

Respectfully submitted,

ARNOLD M. WEINER,

Ten Light Street,
Baltimore, Maryland 21202,

A. KENNETH PYE,

2802 Chelsea Circle,
Durham, North Carolina.

TABLE OF CONTENTS

	PAGE
PETITION FOR REHEARING	1
APPENDIX	1a

TABLE OF AUTHORITIES

Cases

Rewis v. United States, 401 U.S. 808	2
United States v. Archer, F.2d (2d Cir., 1973)	2, 3
United States v. Maze, No. 72-1168	1, 2

Statutes

Mail Fraud Statute, 18 U.S.C. §1341	2
Travel Act, 18 U.S.C. §1952	2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-116

RALPH D. ROCKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING

Petitioner, Ralph D. Rocks, respectfully moves the Court for an order vacating its denial of the petition for a writ of certiorari, entered on November 19, 1973, and granting the petition. As grounds for this motion, petitioner states the following:

1. *The recent argument in the United States v. Maze, No. 72-1168.*

On November 14, 1973, while certiorari in this case was pending, this Court heard argument in *United States v. Maze*, No. 72-1168. The account of the proceedings in

Maze, in the November 28th issue of the Criminal Law Reporter, indicates that the two cases closely parallel each other and that the decision in *Maze* may be determinative of the present controversy. (14 Cr. L. 4099-4101). Although *Maze* involves the reach of the mail fraud statute, 18 U.S.C. §1341, it appears from the argument that the Court has been asked there to redefine the principles articulated in *Rewis v. United States*, 401 U.S. 808, a Travel Act case, and, under facts similar to those here, to enunciate a rule delimiting cases involving a substantial federal interest from those involving only a technical justification for federal criminal intervention. (14 Cr. L. 4099, 4100).

The defendant in *Maze* had employed a stolen credit card to obtain merchandise and the defrauded merchant had thereafter mailed the credit voucher to the credit card company. The issue in that case, most narrowly expressed, is whether the incidental use of the mails, after the merchandise had been obtained fraudulently, resulted in a prosecutable mail fraud. The present case, brought under the Travel Act, involves a check which was allegedly given by the defendant as a bribe, and which, presumably after its delivery to the alleged bribee, thereafter crossed the Maryland-D.C. line (Tr. 65, 113, 169-72, 265, 367, 1801).[1] If the Court should rule in *Maze* that the use of the mails was too insubstantial to bring the case within the reach of the federal act, it should follow that the interstate use in the present case was similarly deficient.

2. *The second opinion in United States v. Archer, ... F.2d. ..... (2d Cir. 1973).*

On September 26, 1973, while the Petition for Certiorari was pending in this case, the Court of Appeals for the Second Circuit, on petition for rehearing, issued a second

[1] See also, Gov't. Brief in Court of Appeals, pp. 6 and 7.

opinion in *United States v. Archer*, ... F.2d ..... (Sept. Term, 1972, Nos. 1039-41). This second *Archer* opinion, not yet reported, appears as the Appendix hereto.

As the second opinion clearly states, only interstate uses in furtherance of the alleged criminal object may be considered in determining whether there is sufficient basis for prosecution under the Travel Act (App. 5a-7a). Innocent interstate activity must be disregarded (App. 5a-7a). The present case involves an indictment for a single alleged use of interstate facilities. The Government's argument here, that innocent interstate transactions between the participants might bolster an otherwise flimsy basis for federal criminal intervention, is in conflict with the express holding of *Archer*.

The second *Archer* opinion takes note of the fact that the Government "professes alarm" at the "precedential effect" of the holding that the casual and incidental use of interstate facilities there did not suffice "to extend federal power" to deal with local corruption (App. 7a). The second Circuit went on to invite further guidance, however, stating, in its concluding sentence, that "the task of further line-drawing" was for "the future". It would appear that the issue is of such significance to the Government and to the courts that this Court should take the opportunity to resolve the problem in the present case.

3. *The pendency of the petition in Baggett v. United States, No. 73-348.*

The petition for certiorari in *Baggett v. United States*, No. 73-348, a companion to this one, arising from the same indictment, is presently pending. The *Baggett* case, involving the alleged bribee, also raises questions as to the scope of the Travel Act. If the Court should grant certiorari in

Baggett, it should also, for the sake of completeness, do the same here.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

ARNOLD M. WEINER,
A. KENNETH PYE,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL

As counsel for the petitioner, we hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

ARNOLD M. WEINER,
A. KENNETH PYE,
Counsel for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1039—September Term, 1972.
1040
1041

Decided September 26, 1973.

Docket Nos. 73-1527
73-1528
73-1711

UNITED STATES OF AMERICA,
Appellee,

v.

NORMAN ARCHER, FRANK R. KLEIN and LEON WASSERBERGER,
Defendants-Appellants.

Before:

Friendly, Feinberg and Mansfield,
Circuit Judges.

ON PETITION FOR REHEARING

PAUL J. CURRAN, United States Attorney for the Southern District of New York (Rudolph W. Giuliani, John W. Nields, Jr., and John D. Gordon III, Assistant United States Attorneys), *for Appellee.*

MAURICE H. NADJARI, Deputy Attorney General (Peter J. O'Connor, Special Assistant At-

torney General), *for the Office of Special Prosecutor, State of New York, amicus curiae.*

FRANK S. HOGAN, District Attorney, New York County (Alfred J. Scotti, Chief Assistant District Attorney, and Michael R. Juviler, Assistant District Attorney), *amicus curiae.*

MICHAEL ARMSTRONG, District Attorney, Queens County, *amicus curiae.*

PER CURIAM:

Beginning with a nine-page description of the background alleged to have justified its setting up the crime with which defendants were charged, the Government attacks both what it characterizes as dicta in our opinion and the precise holding that the use of interstate and foreign telephone facilities in this case did not suffice to bring the defendants within the Travel Act.

Although the record does not contain proof of many of the facts now called to our attention by the Government for the first time as evidence of the background of its investigation, we do not question that the federal prosecutors had been given abundant information about the widespread fixing of cases in the Queens County District Attorney's office,[1] some of which, we are now told, may have involved conduct violating the Travel Act, 18 U.S.C. §1952.

---

[1] This came in principal part from a commission established in 1970 by Mayor Lindsay of New York City and chaired by Whitman Knapp, Esq., a distinguished lawyer who has since become a judge of the District Court for the Southern District of New York. According to the Government's petition, the Knapp Commission sought the assistance of the Department of Justice; the New York City Police Commissioner "thoroughly endorsed" a federal investigation of the Queens County prosecutor's office; and "the United States Attorney disclosed the plan to a member of the state judiciary with administrative responsibility over the state court system in Queens." While this lessens the offensiveness to the State of the conduct here at issue, local invitations cannot expand the constitutional and legislative limitations on federal criminal jurisdiction.

We readily appreciate the justified indignation this aroused and can understand the consequent desire of federal law enforcement officials to clean these Augean stables of the State. That Archer has been dismissed from his post as a result of the Government's effort is indeed a "good" result, as the petition repeatedly emphasizes. None of this, however, is relevant to the sole issue decided, namely, that the evidence here did not show a federal crime under a fair reading of the Travel Act.

The Government devotes much of its petition to issues which we felt desirable to ventilate in view of the appellants' arguments but were at pains neither to decide nor to pronounce dicta. Nine pages of the petition are devoted to an attempt to show that the Government agents committed no crimes and that what it chooses to call the "investigating technique" here employed "was entirely proper," although we expressely left "resolution of this difficult question for another day," ..... F.2d at ....., slip opinion at 4821. The final pages of the petition stoutly maintain that "The Government's investigation of local corruption in this case was a proper and necessary use of federal power." The case for this assertion would certainly be stronger if, as the Government advises us now, as it did not in its brief or argument, there was reason to believe that the local corruption in Queens had involved some violations of the Travel Act. But we specifically declined to decide whether we could or should dismiss the prosecution as an abuse of federal power, ... F.2d at ....., slip opinion at 4823. We thus need only consider Point I of the petition, in which the Government urges that we gave too narrow a reading to the Travel Act.

Despite the copious citation of cases, including many not included in its original brief, not one of the Government's citations supports application of the Travel Act where the sole "federal" elements were telephone calls from or to an undercover agent. Despite grave reservations whether interstate or foreign travel or transportation or use of interstate or foreign telephone facilities by an undercover agent, as distinguished from actual participants in the crime, can

ever supply the federal jurisdictional basis required by the Travel Act, we left open the possibility that this might suffice when sufficiently pervasive or functional. Our holding was on the narrow basis that these conditions were not here fulfilled. In its petition for rehearing, the Government argues that there was at least evidence of an agreement to make interstate or foreign calls, thus justifying the conviction on the conspiracy count, and that legislative history and prior decisions require us to hold that the Las Vegas and Paris calls were sufficient to invoke the Travel Act. We disagree.

On the first point, the Government asserts that "Klein and Wasserberger had, before any actual travel or use of an interstate facility, agreed to use such facilities to promote the bribe." However, the Government greatly overstates the evidence as to the alleged agreement. The transcript of the tape recording of the critical conversation between Bario, Wasserberger and Klein reveals the following: Klein said he must have the bribe money in advance. For that purpose he needed a way to get in touch with Bario. Bario responded that he had no phone in Las Vegas and that he would be out of the country a great deal in the near future. He added that Wasserberger knew whom to call to ensure that the money would be there on time. "There are some people who know exactly where I am at all times," Bario assured Klein. That answer seemed to satisfy Klein, for he made no further inquiries concerning Bario's whereabouts.

Bario and Wasserberger then left Klein's office. The Government states that "Wasserberger and Bario agreed that Bario should call Klein directly to find out if Klein could guarantee that the case would be fixed." That characterization, however, is misleading. Actually, Bario independently proposed that he should call Klein, and he made no mention of where he would be at the time he intended to call. Contrary to the Government's assertion, Bario was given no instructions to call Klein's office on April 25 or any other date; in fact, when Bario called, Klein could only say that he would have some news for him the next day.

The Government insists that it was only after Klein and Wasserberger had exerted great pressure on Bario that he was forced to contrive a Las Vegas "cover." Yet the pretended Nevada connection had been part of the Government's plan from the first. Bario testified at trial that when Klein asked where he lived, he gave the Las Vegas address that the Government had originally supplied for him on his identification papers. Later, while Bario and Wasserberger were driving back to Manhattan, Wasserberger mentioned that he might someday want to visit Las Vegas. It was in response to Wasserberger's expression of interest in visiting him there that Bario volunteered he could be reached at the Sahara Hotel.

In light of this evidence, there is no indication that the defendants agreed either to make or to cause to be made any interstate or foreign telephone calls. At the conclusion of the meeting, Klein expected that he could reach Bario by calling Wasserberger; through Bario's subsequent fabrication, Wasserberger learned — or thought he learned — that Bario could be reached at the Sahara Hotel, but no plans were made for Wasserberger to call him there. The Government points to no further evidence of any agreement.

Besides insisting that the defendants agreed to make interstate or foreign calls, the Government disputes our conclusion that the calls themselves were insufficient to invoke the Travel Act. While it has wisely abandoned its reliance on the Newark calls, it contends that Bario's call from Paris and Wasserberger's unsuccessful attempts to reach Bario in Las Vegas sufficed to meet the jurisdictional requirements of § 1952. We disagree. The Nevada calls are of no jurisdictional significance. Although the Government insists that those calls were not "planted," but were "suggested, pressed for and accomplished solely by the defendants without any encouragement by Bario and despite Bario's actively discouraging such calls," the evidence summarized above shows that Bario volunteered the story about reaching him at the Sahara Hotel, consistent with the Government's design to present him as a

Las Vegas underworld figure. Moreover, while Wasserberger made the calls in an effort to convey information to Bario about the proposed bribe attempt, there was no possibility at any time that the calls could further the enterprise or even go through to the intended recipient.[2]

The Government insists that the Paris call was one that the defendants "caused" Bario to make, but it is clear from the evidence outlined above that Bario made the call on his own initiative. The Government places great weight on the fact that Bario was in Paris on legitimate business and was not sent there solely to manufacture jurisdiction in this case. But that fact alone is not sufficient to qualify the Paris call. Any such holding would permit the Government to convert any local bribery it had provoked into a federal offense by furnishing an out-of-state address for an undercover agent or sending him outside the state on a legitimate errand and having a call made before the offense was consummated. The Travel Act confers ample power on federal law enforcement officers to assist local officials without going so far. Both the legislative history summarized in our opinion and the additional extracts relied on in the Government's petition show that the overriding Congressional purpose was to permit the federal government to act against members of organized crime whose activity crossed state lines when local law enforcement officers were unable or unwilling to do so — not to extend federal power to deal with corruption in local prosecutors' offices by affording the corrupters an opportunity to use interstate or foreign telephone facilities in dealing with an undercover agent on any such "casual and incidental" basis

[2] The Government cites *United States v. Hedge*, 462 F.2d 220 (5 Cir. 1972), as contrary to the result reached here. In that case the Mississippi-based defendants ordered numerous sets of dice from a Las Vegas manufacturing company for which one of them worked as a salesman. The dice arrived in the mail, but the defendants refused to pay for them and they were returned unclaimed. The court upheld their Travel Act convictions even though there was no direct relationship between the use of the mails and the subsequent unlawful gambling. Unlike the Las Vegas calls here, the dice shipment was a bona fide operation which, until the defendants refused delivery, had every prospect of promoting the gambling enterprise.

as here. See *United States v. Corallo*, 413 F.2d 1306, 1325 (2 Cir.), *cert. denied*, 396 U.S. 958 (1969).

While the Government professes alarm at the precedential effect of our decision, we in fact went no further than to hold that when the federal element in a prosecution under the Travel Act is furnished solely by undercover agents, a stricter standard is applicable than when the interstate or foreign activities are those of the defendants themselves and that this was not met here. We adhere to that holding and leave the task of further line-drawing to the future.

The petition for rehearing is denied.